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No. 96-1291-CFX
Status: GRANTED

Title: Dolores M. Oubre, Petitioner
v.
Entergy Operations, Inc.

Docketed:
February 18, 1997

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Haynie,Barbara G.

Counsel for respondent: Phillips,Carter.

Counsel adm. 2-18-97.

Entry	Date	Note	Proceedings and Orders
1	Feb 4 1997	G	Petition for writ of certiorari filed. (Response due March 20, 1997)
2	Mar 20 1997		Brief of respondent Entergy Operations, Inc. in opposition filed.
3	Apr 2 1997		DISTRIBUTED. April 18, 1997 (Page 2)
4	Apr 21 1997		Petition GRANTED. limited to Question 3 presented by the petition. SET FOR ARGUMENT November 12, 1997. **
8	May 1 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fifth Circuit.
9	May 18 1997		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Louisiana (BOX).
6	May 29 1997		Order extending time to file brief of petitioner on the merits until June 20, 1997.
7	Jun 20 1997		Brief amicus curiae of American Association of Retired Persons filed.
10	Jun 20 1997		Joint appendix filed.
11	Jun 20 1997		Brief of petitioner Dolores Oubre filed.
12	Jun 20 1997		Brief amici curiae of United States and Equal Opportunity Commission filed.
13	Jun 20 1997		Brief amicus curiae of National Employment Lawyers Association filed.
16	Aug 20 1997		Brief amicus curiae of Illinois State Chamber of Commerce filed.
14	Aug 21 1997		Brief amici curiae of Equal Employment Advisory Council, et al. filed.
15	Aug 21 1997		Brief of respondent Entergy Operations, Inc. filed.
17	Sep 5 1997	G	Motion of Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Sep 16 1997		CIRCULATED.
19	Sep 22 1997	X	Reply brief of petitioner Dolores Oubre filed.
20	Sep 29 1997		Motion of Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Nov 12 1997		ARGUED.

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(1)

NO. 961291

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES M. OUBRE
PETITIONER

VERSUS

ENTERGY OPERATIONS, INC.
RESPONDENT

CIVIL APPEAL TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the petitioner, pursuant to Older Workers Benefit Protection Act amending the Age Discrimination in Employment Act in 1990, knowingly and voluntarily waived her rights to pursue a cause of action against her employer by executing release upon separation of employment.

II. Whether the petitioner received "consideration" to which she was not already entitled pursuant to the terms of her separation of employment thus, barring a challenge to executed waiver of rights.

III. Whether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the release binding.

LIST OF PARTIES

A) Dolores M. Oubre, petitioner is a person of the full age of majority and resident of the State of Louisiana.

B) Entergy Operations, Inc., a corporation with its principal place of business in the Parish of Orleans and duly authorized to do and doing business in Louisiana.

Petitioner, Dolores M. Oubre, seeks to recover damages from respondent, Entergy Operations, Inc., as a result of unlawful separation from employment based upon her age in January, 1995. Petitioner submits that she did not knowingly and voluntarily execute release of claims at the time of her separation of employment, that she did not receive consideration for said waiver of rights and that the release of claim she executed at the time of her separation did not comply with the requirements of the Older Workers Benefit Protection Act and thus, is void.

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JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was entered on November 6, 1996. This Petition for Writ of Certiorari is sought within 90 days of the Judgment and this timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules of Court for the U.S. Supreme Court.

STATUTES

AGE DISCRIMINATION IN EMPLOYMENT ACT

SECTION 201. WAIVER OF RIGHTS OR CLAIMS

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f)(1) An individual may not waive any right of claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

"(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual elegible to participate;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or cliams that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period had expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(G) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum--

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G) or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may effect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

Louisiana Civil Code Article 1966 - NO OBLIGATIONS WITHOUT CAUSE

An obligation cannot exist without a lawful cause.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DOLORES M. OUBRE
PETITIONER

VERSUS

ENTERGY OPERATIONS, INC.
RESPONDENT

CIVIL APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dolores M. Oubre, respectfully prays that a Writ of Certiorari be granted to review the decision of the United States District Court for the Eastern District of Louisiana granting Motion for Summary Judgment in favor of the respondent and the affirmation of same by the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on November 6, 1996.

STATEMENT OF THE CASE

Petitioner contends that material facts of the case are in dispute and the following is a summarization of the facts as presented to the lower court and the Fifth Circuit Court of Appeals in consideration of Motion for Summary Judgment.

On September 26, 1995, petitioner, Dolores Oubre, a former employee of Entergy Operations, Inc. (EOI) and an individual over the age of 40 at the time of her separation of employment, filed suit in United States District Court, Eastern District for the State of Louisiana. The complaint was brought pursuant to Title 29 U.S.C. § 621, et seq, the Age Discrimination in Employment Act of 1967 (ADEA"), as amended in 1978, 1990, and 1991, and Louisiana Revised Statute Article 23:972 and 51:2231 et seq. The claimant has alleged that she was constructively discharged from her job because of her age.

Dolores Oubre, a single female was employed as an assistant scheduler in the Planning and Scheduling Department at Waterford Steam Electric Generating Station ("Waterford III") in 1994. Oubre had been employed at Waterford as an EOI employee for approximately seven years.

In the fall of 1994, EOI implemented a new employee evaluation process called the Management Planning and Review Ranking Process (The "Ranking Process"). The Ranking Process was allegedly developed to evaluate management and professional (salaried) employees at EOI by ranking them by two criteria, "performance" and "potential", as compared to their peers and transferring those rankings to a matrix that placed employees in one of 9 groups.

It was mandated that 10% of the targeted population ranked in category 9 or the lowest ranked group. People receiving two consecutive annual ratings in group 9 (fall 1994 and fall 1995) were to be terminted from EOI. Termination, however, could occur anytime for employee ranked 9 within

the 12-month period proceeding the next annual evaluation. Severance was not to be paid to individuals terminated from group 9. Those ranked in group 9 were to be given individual action plans with the understanding that even if the individual met all goals there was no guarantee that the individual would move out of group 9 and thus, would be subject to termination without benefits.

Pursuant to the ranking process, Oubre was ranked against all other salaried, non-managerial employees in the Planning and Scheduling Department. She ultimately fell into the group 9 category, although she had been awarded the highest evaluation level compared to her peers for the preceding two years. In 1993, Oubre was the only assistant scheduler deemed a valuable contributor while the two remaining assistant schedulers received lower ratings. In 1992, Oubre received a promotion from computer operator I to computer operator II, an indication that she was promotable, which was a criteria for evaluation under the "potential" prong of the two pronged 1994 rating process. Further, the plaintiff had completed *all* of her goals established by her immediate supervisor for 1994, a criteria to be used when evaluating an employee's annual performance, the second prong of the 1994 rating process. Thus, Oubre had no forewarning that she would fall within the 9 ranking and be faced with termination.

On January 17, 1995, Oubre was notified of her 9 ranking and the consequences thereof, i.e., that if she were ranked a 9 in next year's evaluation she would be terminated, that an action plan would be developed for her (though one was not available for her review) and if she did not continue to meet the goals and objectives of the action plan, she would be terminated at anytime and even if she met all the goals,

it would be very difficult to move out of the 9 ranking. Once informed of the precarious and vulnerable status in which she found herself as an employee ranked 9, Oubre was then presented with a severance package that included a general release.

The petitioner was given only two weeks to contemplate and to comprehend the abrupt change in her employment statuts based upon an evaluation that was inconsistent with her previous performance evaluation history; determine the availability of her employment opportunities which would afford her enough income to meet her monthly financial obligtions; to assess her employability based upon having been determined one of the lowest rated employees; and to evaluate the risk in selecting the action plan, which had not yet been drafted and which would subject her to potential termintion within one to two months without any benefits - or accept the severance package. On January 31, 1995, after a second meeting with her immediate supervisor, Jim Rooney, to clarify that it would be virtually impossible for her to move out of a 9 ranking, Oubre accepted the severance package, signed the release and was paid by EOI in accordance with the payment outlined in the severance package.

Given the circumstances surrounding the offer of the severance package, i.e., unexpected placement into the lowest ranked group of employees at Waterford in contrast to her previous outstanding work performance and promote-ability potential, the insufficient time within which to review the two options presented and the threat of termination if she opted to remain at EOI, the petitioner felt compelled to accept the severance and in return executed the waiver of rights.

Following limited discovery Entergy Operations, Inc., filed a Motion for Summary Judgment on May 2, 1996. Respondent argued that the claimant knowingly and voluntarily waived her rights to bring civil suit because she signed a release at the time of her separation of employment and ratified the invalid release by failing to return the benefits she received pursuant to the terms of her separation of employment.

The lower court entered Judgment in favor of the defendant's Motion for Summary Judgment on May 23, 1996. The Court ruled that it was not at liberty to disregard the jurisprudence of the Fifth Circuit Court of Appeals which portends that an invalid release pursuant to the OWBPA is merely voidable and not void and that the claimant who retains funds received upon separation of employment and does not tender back said sums acts to ratify the voidable release making it binding.

Notice of Appeal from final judgment rendered on May 23, 1996 was timely filed by the claimant on June 19, 1996. Judgment was rendered by the Fifth Circuit of Appeals on November 6, 1996 affirming, without reason, the lower court ruling which granted respondent's Motion for Summary judgment. Petitioner now seeks review of the lower courts' decisions in this Court by writ of certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. Introduction

Petitioner submits the following in support of her writ of certiorari to review the decision of the Fifth Circuit Court of Appeals rendered on November 6, 1996 affirming the District Court, Eastern District of the State of Louisiana, granting respondent's Motion for Summary Judgment. In granting summary judgment the lower court departed from the accepted standard of review regarding issues of material fact and said departure was sanctioned by the Fifth Circuit Court of Appeals. Further, because the Fifth Circuit Court of Appeals' decision is in conflict with the decisions of Seventh and Eleventh Circuit Court of Appeals on the same relevant matter-whether an invalid release under the Older Workers' Benefit Protection Act is void as opposed to voidable and whether a tender back of consideration is a prerequisite to bring suit in an action alleging violation of the Age Discrimination in Employment Act, the petition for writ of certiorari should be granted.

II. Standard for Review on Summary Judgment

In reviewing summary judgment, the court must view the evidence presented in light most favorable to the party opposing the motion. *Rhodes v. Guiberson,* 75 F. 3d 959 (5th Cir. 1996). The test utilized by the Fifth Circuit for review of summary judgment is *sufficiency of the evidence* under the *Boeing Co. v. Shipman,* 411 F.2d 345 (5th Cir. 1969) (en banc) standard. Under *Boeing,* there must be a conflict in substantive evidence to create a jury question. *Id.* at 375. In the present case, a jury question is present because the petitioner presented evidence, when taken as a whole, created a fact issue as to whether she knowingly and voluntarily executed the waiver and release offer by EOI upon separation from

employment.

III. Legislative Intent in Enacting § 626 (f) (1)

Congress has long recognized that when an employer asks an older worker to give up rights under the Age Discrimination Employment Act, protection must be in place to insure that the older worker does so freely, with his full knowledge of his rights under federal law. Until 1987, this protection was in the form of federal government or court supervision of waiver of rights. In 1987, the Equal Employment Opportunity Commission issued regulations permitting older workers to waive their rights without supervision. Congress, recognizing that these regulations could lead to potential employer abuse of waivers, suspended the regulations for two years and amended the ADEA by adding specific requirements which govern waiver of rights or claims. This growing concern about what standards should govern releases and how best to insure the protection of the older worker served as the nucleus of the Older Workers' Benefit Protection Act (OWBPA) enacted in 1990.

The OWBPA amended § 626 of the Age Discrimination in Employment Act (ADEA) by adding subsection (f) which requires that an individual may not waive "any right or claim under [the ADEA] unless the waiver is knowing and voluntary". 29 U.S.C. § 626 (f) (A)-(H). Pursuant to the new law, the establishment of the validity of the waiver under the statutory threshold requirements was the first inquiry regarding a challenged release. 136 Cong. Rec. S13, 597 (daily ed Sept. 24, 1990)

In addressing the standard of inquiry to be used in subsequently determining whether a waiver was made knowingly and voluntarily, the Senate managers of the bill passed by the Senate and House, and later signed into law as the OWBPA, purported to leave intact pre-OWBPA case law insofar as those decisions concerning the substantive determination of whether, in a given situation, a waiver has been executed knowingly and voluntarily. The Senate Committee specifically expressed support for the *totality of the circumstances* analysis utilized in *Civillo v. Arco Chemical Company*, 862 F.2d 448 (3rd Cir. 1988), and it disapproved, as did the House Committeee, the approach used in *Lancaster v. Buerkle Buick Honda Company*, 808 F.2d 539 (8th Cir.), *cert denied* 482 U.S. 928 (1987) which entailed the application of ordinary contract doctrine. *Senate Committee Labor & Human Resources*, the Older Workers Benefit Protection Act, S.Rep. No. 236, 101 St. Cong., 2d Sess 32 (1990) Relevant factors to be considered under the totality of the circumstances approach includes the preciseness of the release language; the amount of time the claimant had for deliberation; whether the claimant was aware of her rights and was encouraged to seek advise of counsel; opportunity for negotiation; and whether the claimant received consideration for which she was not already entitled. *Civillo*, 862 F.2d at 451. These same factors were incorporated into § 7(f) of the OWBPA.

IV. Validity of Release Pursuant to Minimum Statutory Requirements.

In order for a waiver by an individual to be "knowing and voluntary", § 626(f) (1) requires, *at a minimum*, that the following criteria are met:

1) the waiver must be part of an agreement that "is written in a manner calculated to be understood by [the] individual or by the average individual eligible to participate";

2) *it must specificaly refer to rights or claims arising under the ADEA;*

3) the individual does not waive "rights or claims that may arise after the date the vaiver is executed";

4) *the individual does not waive rights or claims in exchange for consideration "to which the individual is already entitled";*

5) the individual "is advised in writing to consult with an attorney before executing the agreement";

6) *the individual is given 21 days to consider the agreement or — if the waiver is requested in connection with an exit incentive or an "employment termination program" offered to a group of employees — 45 days to consider the agreement;*

7) *the agreement must give the individual a period of seven days to revoke the agreement, and provide that the waiver is not effective or enforceable until after expiration of the revocation period;* and

8) *where a waiver is requested in conjunction with an exit incentive or employment termination program, the employer must inform the in-*

dividual at the start of the 45-day consideration period of the class of individuals covered by the program along with any eligibility factors for the program and any time limits involved, as well as the job titled and ages of individuals covered or selected by the program and the same information for individuals "in the same job classification or organizational unit" who are not eligible or selected for the program. Id. (emphasis added)

The proposition that if a release is not entered into knowingly and voluntarily it will not be enforceable against the employee who signed it is at the heart of § 7(f) of the OWBPA. The OWBPA sets forth minimum requirements to be met for a waiver to be considered knowing and voluntary. The Act creates a floor not a ceiling. *Soliman v. Digital Equipment Corporation*, 869 F.Supp. 65, 69 Fn13 (D.Mass. 1994)

In the present case, a review of the release drafted by Entergy Operations, Inc. (EOI) and executed by the claimant woefully lacks a majority of the "minimum" requirements outlined by the act. The release reads as follows:

> "I, ______, knowingly, voluntarily; and for valuable consideration agree to waive, settle, release, and discharge any and all claims, demands, damages, actions or causes of action occurring on or before the date of the execution of this Release, whether known of hereafter discovered, that I may have against Entergy Operations, Inc., its parent corporation,... ("the Company"), which in any way relate to my employment by or my separation from the company.
>
> I acknowledge that I was provided with a copy of this release, that I was advised to discuss this release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claim covered by the Release, I am waiving potentially valuable rights by signing below. My execution of this release is free and voluntary and was not produced through duress, coercion or undue influence.
>
> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT BE OTHERWISE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT."

The release does not specifically refer to claims airing under the ADEA; the release does not provide for the requisite 21 day (or questionably 45 days) to consider the agreement; the release does not provide for a seven day revocation period following execution; and the release does not provide specific information with regard to individuals in the same job classification not eligible for the program.

It is clear that characterization of the "program" which the claimant was offered is in question with regard to individual or group termination. Individual separation agreements are the result of adverse actions taken against an individual employee. The employee understands that action is being taken against him, and he may engage in negotiations to resolve any differences with his employer.

Group termination and reduction programs are drastically different from individual separation. *See, Burch v. Fluor Corp.*, 867 F. Supp 873 (E.D. Mo 1994).

While the respondents content that the severance package was a voluntary offering and the 1994 ranking process was not promoted as a reduction in force plan, its effect-that a mandated 10% of targeted employees were to be ranked 9, that they were to be eventually terminated if they chose to remain employed at EOI, and, at least in the petitioner's case, the position she vacated was not filled-was to reduce the number of workers employed at Waterford. Further, a standardized formula or package of benefits was presented to each rank 9 employee and the terms presented were not negotiable, a trademark of group termination programs.

Although most group programs are not based on individual characteristics, the manner in which the employees were ranked 9 and the objective of the ranking and subsequent termination program - a 10% reduction in work force - calls into question whether the Petitioner was subject to an individual termination or group termination. *See, Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993) (Wherein the court ruled that termination of sixty plus employees terminated at one time satisfied OWBPA's definition of a group termination.) Regardless, the release prepared by EOI did not provided the minimal requisite amount of time for the employee to contemplate the offer.

The thrust of the legislative review of the OWBPA before its passage regarding the necessity of safeguards in addressing waivers in which an older worker knowingly and willingly abandons his rights rested upon the premiss that employers should not pressure individuals into signing a

waiver of legal rights, either by lack of time to adequately consider the terms and conditions of the offer, or through an insufficient explanation of the offer or the circumstances leading to the offer. *See Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor,* House of Representatives, One Hundred First Congress, April 18, 1989. The provisions enumerated in the act, when included in a waiver, provide the employee with the necessary time and knowledge to make an informed decision regarding the offer extended by the employer. The lack of the minimun requirements raises the presumption that the employee did not have sufficient time or information to knowingly waive his rights. *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993); *E.E.D.C. v. Sara Lee Corp.* 923 F.Supp 994 (W.D. Mich 1995); *Solimen v. Digital Equipment Corp.*, 869 F.Supp 65 (D. Mass; 1994); *Carr v. Armstrong Air Conditioning, Inc.*, 817 F.Supp. 54 (N.D. Ohio 1993).

Pursuant to the provisions of the Act, the release drafted by EOI does not meet statutory requirements of a valid release on numerous counts and thus is void. Without inclusion of the minimum rquirements a material issue of fact is raised as to whether Oubre did not "knowingly and voluntarily" waive her rights to pursue a claim against EOI.

V. Validity of Release - Duress

The OWBPA, in providing statutory guidelines in favor of employees, clearly stands for the edict that employers should not be permitted to exploit their superior bargaining positions and the vulnerable conditions of their older workers by forcing them to sign away their rights. The extent of pressure placed upon the claimant should be considered when determining whether a claimant has voluntarily and will-

ingly signed a release. *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3rd Cir. 1988). In *Coventry*, the Court ruled that the employer placed unfair economic pressure on the claimant to sign a release when faced with the option of having all of his income and benefits ceased immediately. *Id.* at 524. As stated by Chairman Edward R. Roybal in addressing the necessity of the OWBPA:

> "...An older worker, faced with the likely prospect of termination, and knowing the difficulties of finding another job at an older age is in a desperate situation. He often has not alternative but to take whatever benefits the employer is willing to offer him, even if it means giving up fundamental employment rights. Furthermore it is highly unlikely that, at this point the older worker even knows what fundamental rights he is entitled to.
>
> I believe that this is totally unacceptable. Employers should not be permitted to exploit their superior bargaining position, and the vulnerable condition of older employees, by forcing them to sign away their rights. By allowing this to continue, we are simply encouraging employers to engage in discriminatory employment practices." *Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor,* House of Representatives One Hundred First Congress, April 18, 1989.

Given the circumstances of the case at bar: the incredulous placement of the claimant into the lowest ranked group of employees at Waterford in contrast to her outstanding work performance and promotability; the insufficient time within which to contemplate the two options presented in contrast to the enormous amount of time expended by the company in devising a plan to reduce its work force by 10% and prepare severance packages; and the threat of immediate termination if the claimant opted to remain at Entergy Operations, Inc., the claimant did not believe she had a choice with regard to accepting the severance.

An older worker, such as the petitioner, faced with the likely prospect of termination and knowing the difficulties of finding another job at an older age, is in a desperate situation. She had no alternative but to take whatever benefits the employer is willing to offer her, even if it means giving up fundamental employment rights. The provisions of OWBPA was enacted to create a "level playing field" between employer and employee. When allowed to ignore these requirements, the employer is placed in a favored position to exercise its superior bargaining power to the disadvantage of the employee. The evidence is overwhelming that Entergy Operations, Inc. used its superior bargaining position to place unfair economic pressure on the claimant to sign the release. Thus, here is a material issue of fact as to whether the claimant willingly and voluntarily signed the invalid release.

VI. Consideration Requirement of the Act

Codified in the OWBPA at § 7 (f) (1) (D) is the common law doctrine that a waiver may not be considered knowing or voluntary unless the individual waives rights or claims in exchange for consideration in addition to anything of value to which the individual is entitled. Further, it is fundamental in Louisiana Law that for a contract to be valid there must

be cause or consideration. LSA-C.C. Art. 1966. The key factor is determining the validity of a release is not the amount of consideration the person given the release receives but rather whether the person received something to which he was not previously entitled. *Schott-Norton Ford, Inc. v. Ford Motor Company,* 524 F.Supp. 1099 (D. Minn. 1981), *affirmed without opinion,* 685 F.2d 438 (8th Cir. 1982).

By signing a release and waiver of claims, Oubre received one month administrative leave and one week of salary for each year of accredited service. The money was not paid in one sum but over a period of time as if the claimant were on payroll. Employees who had been previously involuntarily terminated received the same consideration but were not required to execute a release and/or waiver of rights. In late 1995, a voluntary severance package was offered to select employees including some previously ranked nine which provided for two months administrative leave and two weeks of salary for each year of accredited service in exchange for a release of claims.

Thus, Oubre did not receive any *additional* consideration in exchange for a release, whether considered voluntary or involuntary, waiving all rights to pursue claims against EOI. The employees involuntarily laid off in 1994 received like compensation but were not required to sign a release. The employees who were approached with voluntary severance for a release were offered twice the amount of consideration offered the claimant as an inducement to voluntarily end their employment relationship with EOI. While it is a question of fact whether the claimant was voluntary or involuntarily separated from her employment at EOI, she did not receive like compensation as compared to other employees. *But see, O'Hara v. Global Natural Resources, Inc.,* 898 F.2d 1015 (5th Cir. 1990). The Fifth Circuit Court of

Appeals, in rejecting O'Hara's claim that the release was unsupported by consideration, ruled that the claimant gave up a disputed right to benefits she would have received had she been discharged without cause for an undisputed right to a smaller package of benefits.

In the present case, the claimant did not receive any consideration for execution of release in addition to which she was already entitled pursuant to EOI's prior and subsequent handling of all other employees who were offered severance packages upon separation from the company. The District Court did not make a determination on this issue, nor did the Fifth Circuit Court of Appeals. There remains a material question of fact as to whether the claimant received consideration for execution of the release and whether the lack thereof would render the release void. This matter is not ripe for final disposition and the lower court deviated from the accepted standard of review in granting summary judgment.

VII. Failure to tender back severance funds does not ratify an otherwise invalid OWBPA release.

In support of summary judgment, EOI relied upon a recent line of cases arising from the Fifth Circuit Court of Appeals which examined the criteria set forth in the Older Workers Benefit Protection Act ("OWBPA"), 1990 amendment to the ADEA; the necessity for strict compliance with the OWBPA; and an individual's ratification of a release which is not in strict compliance with the OWBPA. Pursuant to this jurisprudence, in signing the release; in accepting the consideration; and in failing to tender back the consideration, the petitioner has ratified the defective release and thus is held to its terms in waiving all rights to pursue any claims against Entergy Operations, Inc. *Blakeney v.*

Lomas Information Systems, Inc., 65 F.3d 482 (5th Cir. 1995); *Wiffort v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994); and *Wamsley v. Champion Refining and Chemicals, Inc.*, 11 F.3d 342 (5th Cir. 1994). The petitioner contends that the defendant's reliance upon the Fifth Circuit's rational in applying strict contract doctrine is in error.

Pursuant to *Wamsley* and its prodigy, the defective waiver in the case subjudice is merely voidable and not void. *Id.* at 539. Failure on behalf of the petitioner to tender back the consideration for the promise not to sue, manifests an intention to be bound by the terms of the waiver. *Id.* at 540. In *Wamsley*, the Fifth Circuit explored in detail the doctrine of contractual ratification and the congressional intent in enacting OWBPA to arrive at the conclusion that a waiver which is not in compliance with the requirements delineated in OWBPA is voidable and not void. *Id.* at 538-39.

The petitioner contends, however, that the Fifth Circuit Court of Appeals' rational is erroneous. A careful review of *Wittford* reveals that the claimant was offered an "enhanced" severance package in exchange for execution of a waiver of rights. If the waiver was not executed the claimant would have received severance pay at a lesser value. Thus, the consideration provision of the OWBPA was met and pursuant to the Fifth Circuit's interpretation retention of the consideration led to a ratification of the invalid release. In *Blakeney* the employer complied with the provisions if the OWBPA. Instead of erroneously relying on ratification doctrine, the Fifth Circuit should have reached the same correct ruling by upholding the presumption that the claimant knowingly executed the waiver because of the company's compliance with the law.

In the present case the petitioner was not given adequate time to consider the offer, adequate information regarding the basis of the offer, nor consideration for execution of the release. As previously argued, Oubre was not offered any additional compensation to which she was not already entitled. Thus, she could not tender back consideration which she never received to void the waiver. There has been no determination by the lower court or the Fifth Circuit that the money received by Oubre was indeed valid consideration in exchange for her waiver of rights. Thus, based upon the lack of considertion contract doctrine urged by the Fifth Circuit does not apply and the waiver is void. Further, as previously argued, the release drafted by EOI did not meet the minimum requirements of the act, therefore a presumption is created in the present case that the petitioner did not knowingly waiver her rights.

It is clear from the mere fact that the ADEA, established in 1967 to protect employees at least 40 years of age from discriminatory employment practices based on age, was amended by the OWBPA in 1990, that Congress intended to afford older workers with additional rights when releases are utilized by employers. Pursuant to the Congressional history previously presented, it is clear that the legislative intent regarding interpretation of the OWBPA and the implementation thereof was to be reviewed upon the totality of the circumstances on a case by case basis and not on strict contractual doctrine.

In articulating that the legislative history of the Act animates that the fundamental purpose of the OWBPA waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion or mistake of material fact (contractual issues), the Fifth Circuit Court ignores the *totality of the*

circumstantial review standard. When Congress enacted the ADEA, it had in mind not only to provide benefits to victims of discrimination, but also to create incentives to companies to obey the law. To allow unrestricted and unlimited use of invalid waivers and to apply existing contract law to determine their enforceability will circumvent the intent of the law. Further, the Fifth Circuit's own dicta argues that such grounds to contest contractual performance, as delineated above, were already available to employees faced with an ADEA waiver prior to the enactment of the OWBPA. *Wamsley* at 537 n. 8.

To thus rule that non-compliance with the statute renders a waiver voidable and not void is in direct contradiction to the spirit and the language of the statute. Waivers which comply with OWBPA contain express provisions to insure employees have all the information and the time to consider that information. The OWBPA states that an individual "may not" waive any right or claim under ADEA unless the waiver is "knowing and voluntary". In *Oberg v. Allied Van Lines, Inc.*, the Court concluded that "[N]o matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waive' forbids any waiver". 11 F. 3d at 682 (7th Cir. 1993).

Further, to arbitrarily circumvent those requirements articulated in the OWBPA and place an employee under duress to make decisions with regard to waiver of rights contradicts the spirit of the law, which is "to help employees and workers find ways of meeting problems arising from the impact of age in employment". The facts as presented in the case clearly show how an employer can circumvent the spirit of the law. The actions of EOI are in direct contradiction not only to the letter of the OWBPA but the intent of the law

to enable older workers and employees to find amicable means of resolving problems arising from an aging work force. 29 U.S.C. § 621 (b).

This rational was articulated by the Court in *Forbus v. Sears, Roebuck and Company, et al*, 958 F.2d 1036 (11th Cir. 1992) in which the Fifth Circuit's ruling in *Grillet v. Sears, Roebuck and Company*, 927 S.2d 217 (5th Cir. 1991) regarding ratification was rejected. 927 F.2d at 221. (Grillet addressed a pre-OWBPA decision in which the Fifth Circuit abandoned the totality circumstances approach with regard to determining "knowingly and voluntarily" and resorted to strict law of contract) The *Forbus* Court relied upon the Supreme Court's ruling in *Hogue v. Southern Rig Company*, 390 U.S. 516 (1968), which involved a suit under the Federal Employee's Liability Act, 45 U.S.C. § 51 et seq. ("FELA"), to rule that a tender back of consideration was not a prerequisite to bringing suit in an ADEA action. *See also, Constant v. Continental Telegraph Co.*, 745 F.Supp. 1374 (Co.I11 1990); *Isaacs v. Caterpillar, Inc.*, 765 F.Supp. 1359 (R.D.I11. 1991) (relying on *Hogue* to reject tender requirements in an ADEA case.) In *Forbus*, the Court found no basis for rejecting the Supreme Court's reasoning in *Hogue*, as the Fifth Court has, and for not applying it to ADEA claims as well as FELA claims. 958 F.2d 1036 at 1040.

As concisely stated by the Court, "[B]oth are remedial statues designed to protect employees". *Id.* at 1041. As articulated in *Isaacs*, public policy considerations support the determination that retirees, as in the *Forbus* case, or older workers, as in the case at bar, should not be required to tender back their retirement benefits [severance benefits] as a prerequisite to the maintenance of their lawsuit. 765 F.Supp. at

1366-68. In addressing this public policy issue, the *Forbus* court stated:

> "The Court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. *Such a rule would, in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company.* The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case. As the Supreme Court decided in *Hogue,* unless the release otherwise bars recovery, the benefits paid "shall be deducted from any award determined to be due to the injured employee." 390 U.S. at 518, 88 S.Ct. at 1152. (emphasis added)

The interpretation currently held by the Fifth Circuit places an employee in a severely disadvantaged bargaining position in contrast to the employer-the specific concern raised time and again in the legislative history of the Act.

In *Wamsley,* the Fifth Circuit Court failed to take into considertion these public policy issues. In the case at bar, the funds Oubre, a single woman relying solely upon her own income, received (on a monthly basis, as opposed to a lump

sum) were used to pay living expenses. The petitioner is currently making one-half the salary she earned at EOI and it would be an extreme hardship to require the petitioner to tender back the funds received from EOI at this point in time. The facts of the case are an example of the "egregious behavior" cautioned by the *Forbus* Court if employers are allowed to so easily circumvent the law.

Given the totality of the circumstances, the review standard urged by the Seventh and the Eleventh Circuits it is clear that the failure of the petitioner to tender back severance funds should not ratify and make binding an otherwise invalid release, as urged by the Fifth Circuit, devised to ignore the requirements of the OWBPA.

CONCLUSION

Viewing all evidence in light most favorable to the petitioner, the applicable standard to be used in review of summary judgment, question of material fact exists with regard to whether the petitioner "knowingly and willingly" waived her rights to pursue a claim under the ADEA by executing a release upon separation of employment. The release prepared by EOI is invalid on its face because it does not meet the minimum statutory requirements of the OWBPA and a presumption of unknowing and unwillingness is created. Further, given the circumstances of the offer, the employer placed undue economical pressure upon the petitioner to accept the offer. Thus, a question is raised as to the petitioner's willingness to execute the release.

An additional material issue exists pertaining to whether Oubre received consideration for execution of the

release. The petitioner was given less material consideration than other employees who were required to sign a release and was given similar consideration to employees who were not required to sign a release. Within this issue remains a material question of fact as to the validity of the ranking program as an evaluation process or as subterfuge for a 10% reduction in work force.

In light of the foregoing, it is clear that the lower court departed from the accepted standard of review in granting summary judgment. Issues of material fact remain in dispute and this matter was not and is not ripe for final disposition by the court.

Further, and more significantly for purposes of this writ application, there exists a clear and distinct conflict between the Seventh and Eleventh Circuits on the one hand and Fifth Circuit on the other regarding interpretation of the affect of executed waivers which do not comply with the OWBPA and an older worker's rights in pursuing a claim under the ADEA. The petitioner, therefore, urges this Honorable Court to grant writ of certiorari to correct the error of the lower court and to resolve the conflict of law which exists in the circuit courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this pleading has been forwarded to all counsel named below by placing same in the United States Mail, properly addressed and postage pre-paid on this 4th day of February, 1997.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	CIVIL ACTION
VERSUS	NUMBER: 95-3168
ENTERGY OPERATIONS, INC., ET AL	SECTION: "C" 4

JUDGMENT

Considering the Court having granted the motion by James P. Rooney and David Shipman to dismiss plaintiff's complaint and the motion by Entergy Operations, Inc. for summary judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Entergy Operations, Inc., Jim Rooney and Dave Shipman and against plaintiff Dolores M. Oubre, dismissing said plaintiff's complaint with prejudice, each party to bear its own costs.

New Orleans, Louisiana, this 28 day of May, 1996.

JUDGE GINGER BERRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	CIVIL ACTION
VERSUS	NUMBER: 95-3168
ENTERGY OPERATIONS, INC., ET AL	SECTION: "C" 4

ORDER AND REASONS

This matter comes before the Court on motion for summary judgment filed by the defendant, Entergy Operations, Inc., ("Entergy"). Having considered the record, the memoranda of counsel and the law, the Court has determined that the summary judgment should be granted for the following reasons.

The undisputed facts reveal that the plaintiff, Dolores M. Oubre ("Oubre"), worked for the defendant, Entergy Operations, Inc. ("Entergy"), as a salaried employee at the Waterford Steam Electric Generating Station. In 1993, she received a poor work performance ranking from Entergy. All employees who received such rankings were offered the option of accepting a voluntary severance package and signing a release of claims or improving their performance by meeting the criteria of individually developed action plans. She was informed of her ranking and her options at a meeting with James Rooney ("Rooney") and David Shipman on January 17, 1995. She was given a letter containing the terms of the severance package and release and two weeks within which to make her decision.

On January 31, 1995, the plaintiff advised Rooney of her decision to accept the voluntary severance package and she signed the release. The release reads in relevant part as follows:

> I, Dolores M. Oubre, knowingly, voluntarily, and for valuable consideration agree to waive, settle, release and discharge any and all claims, demands, damages, actions, or causes of action occurring on or before the date of the execution of this Release, whether known or hereafter discovered, that I may have against Entergy Operations, Inc., its parent corporation, subsidiaries, affiliates, officers, directors, employees, agents, and legal representatives and their respective successors, heirs, and assigns ("the Company"), which in any way relate to my employment by or my separation from the Company.
>
> I acknowledge that I was provided with a copy of this Release, that I was advised to discuss this Release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claims covered by this Release, I am waiving potentially valuable rights by signing below. My execution of this Release is free and voluntary and was not procured through duress, coercion, or undue influence.
>
> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS

> RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT BE OTHERWISE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT.

The plaintiff has admitted in deposition that she understood the terms of the severance package, consulted with two attorneys about the offset of the release, received all monies under the severance package and has returned no money to Entergy.

Based on these undisputed facts, Entergy argues that the plaintiff has waived her right to bring this action because she signed the release and later ratified it by failing to return the benefits she received as a result of the severance. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 1403 (1995). The plaintiff argues that the release did not comply with the requirements of the Age Discrimination in Employment Act ("ADEA")m 29 U.S.C. §621 *et seq*, and its 1990 amendment, the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §626 (f) (A) - (H) and that the rationale adopted by the Fifth Circuit in *Wamsley* is erroneous.

The OWBPA provides that an individual cannot waive any right or claim under the ADEA unless the waiver is "knowing and voluntary" and provides that unless the waiver meets certain minimum criteria it may not be considered "knowing and voluntary". It is undisputed that the release

signed by the plaintiff did not meet some of these criteria, including the requirements that specific reference to ADEA rights be made, that a waiting period of at least 45 days within which to consider the agreement be given and that a seven day period following execution to revoke the agreement be provided. 29 U.S.C. §626(f) (1) (B), (F), (G).

The Fifth Circuit has specifically held however that the failure to meet the requirements of subsections (A) through (H) of the OWPA does not render the agreement void of legal effect even though not "knowing and voluntary". *Wamsley*, 11 F.3d at 539. Rather, such waivers are only subject to being avoided at the employee's option. According to *Wamsley*, where the employee chooses to retain and not tender back the benefits paid consideration for the agreement, she manifests an intention to be bound by the waiver and makes a new promise to abide by its terms. *Wamsley*, 11 F.3d at 540. *See also: Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1042 (1996).

The undisputed facts here fit squarely into the rule set forth in *Wamsley* and affirmed in *Blakeney*. This Court is not at liberty to disregard the law announced by the Fifth Circuit.

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by the defendant, Entergy Operation, Inc., is hereby GRANTED.

New Orleans, Louisiana, this 23 day of May, 1996.

JUDGE GINGER BERRIGAN

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STSTES COURT OF APPEALS
For the Fifth Circuit

No. 96-30654
Summary Calender

DOLORES M. OUBRE,
Plaintiff-Appellant,

VERSUS

ENTERGY OPERATIONS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(95-CV-3168-C)

BEFORE GARWOOD, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Dolores M. Oubre appeals from the district court's grant of summary judgment in favor of her employer, Entergy Operations, Inc., in her age discrimination action.

[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.4.4.

We have reviewed the record and the parties' briefs and find no reversible error. Accordingly, the judgment is AFFIRMED for the reasons enunciated by the district court.

APPENDIX D

AGE DISCRIMINATION EMPLOYMENT ACT

SECTION 201. WAIVER OF RIGHTS OR CLAIMS

Section 7 of the Age Discrimination in Employment Act of 1967 (20 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f) (1) An individual may not waive any right of claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum —

"(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period had expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

(i) any class, unit, or group or individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, as an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum —

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) in any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C). (D). (E), (F), (G) or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may effect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

* * *

SECTION 202 - EFFECTIVE DATE

(a) IN GENERAL - The amendment made by section 201 shall not apply with respect to waivers that occur before the date of enactment of this Act.

(b) RULE ON WAIVERS - Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627. 16(c) of title 29, Code of Federal Regulations, shall have no force and effect.

* * *

TITLE III - SEVERABILITY

SECTION 301 - SEVERABILITY

If any provision of this act, or an amendment made by this act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

APPENDIX E

Louisiana Civil Code Article 1966 - NO OBLIGATIONS WITHOUT CAUSE

An obligation cannot exist without a lawful cause.
Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

APPENDIX F

Louisiana Revised Statute 51:2231 - LOUISIANA HUMAN RIGHTS COMMISSION

§ 2231 Statement of purpose; limitation on prohibitions against discrimination because of age.

A. It is the purpose and intent of the legislature by this enactment to provide for execution within Louisiana of the policies embodied in the Federal Civil Rights Act of 1964, 1968, and 1972 and the Age Discrimination in Employment Act of 1967, as amended; and to assure that Louisiana has appropriate legislation prohibiting discrimination in employment and public accommodations sufficient to justify the deferral of cases by the Federal Equal Employment Opportunity Commission, the secretary of labor, and the Department of Justice under those statutes; top safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age, disability, as defined in R.S. 51: 2232(11), or national origin in connection with employment, and in connection with public accommodations; to protect their interest in personal dignity and freedom from humiliation, to make available to the state their full productive capacities in employment; to secure the state against domestic strife and unrest which would menace its democratic institutions; to preserve the public safety, health, and general welfare; and to further the interest, rights, and privileges within the state.

B. The prohibitions in this Chapter against dis-

crimination because of age in connection with employment and in connection with public accomodations shall be limited to individuals who are at least forty years of age but less than seventy years of age.

* * *

§ 2242 Employment, discriminatory practices prohibited

A. It shall be a discriminatory practice for an employer:

(1) To fail, to refuse to hire, or to discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, creed, color, religion, sex, age, disability, as defined in R.S. 51: 2232(11), or national origin.

(2) To limit, segregate, or classify an employee or applicant for employment in any way which would deprive or tend to deprive an individual or employment opportunities or otherwise adversely affect the status of an employee, because of race, creed, color, religion, sex, age, disability, as defined in R.S. 51:2232(11), or national origin.

* * *

§ 2256 Conspiracy to violate this Chapter unlawful

It shall be an unlawful practice for a person or for two or more persons to conspire:

(1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this Chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this Chapter.

(2) To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this Chapter.

(3) To obstruct or prevent a person from complying with the provisions of this Chapter or any order issued thereunder.

(4) To resist, prevent, impede, or interfere with the commission, or any of its members or representatives, in the lawful performance of duty under this Chapter.

APPENDIX G

Louisiana Revised Statute 23:971 - MISCELLANEOUS PROVISIONS

§ 972 Prohibitions of age discrimination; employer practices; exceptions

A. It is unlawful for an employer to:

(1) Fail or refuse to hire, or to discharge, any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

(2) Limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

(3) Reduce the wage rate of any employee in order to comply with this Part.

B. It is unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

C. It is unlawful for a labor organization to:

(1) Exclude or expel from it membership, or otherwise discriminate against, any individual because of his age.

(2) Limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way, which would deprive or tend to deprive any individual of employment opportunities, or limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, solely because of such individual's age; or

(3) Cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

D. It is unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this Section, or becuase the individual member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Part.

E. It is unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such employment agency indicating any preference limitation, specification, or discrimination based on age.

F. It is not unlawful for an employer, employment agency, or labor organization to :

(1) Take any action otherwise prohibited under Subsections A, B, C, or E, where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Part except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) Discharge or otherwise discipline an individual for good cause.

G. The prohibitions of this Part shall be limited to individuals who are at least forty years of age but less than seventy years of age.

(2)

No. 96-1291

In The

Supreme Court of the United States

October Term, 1996

DOLORES M. OUBRE,

Petitioner,

vs.

ENTERGY OPERATIONS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether the Older Workers Benefit Protection Act forecloses application of the traditional common law doctrines of ratification and estoppel in the context of an allegedly unenforceable contract for the release of claims under the Age Discrimination in Employment Act.

PARTIES TO THE PROCEEDINGS

Petitioner, appellant below, is Dolores M. Oubre.

Respondent, appellee below, is Entergy Operations, Inc. ("EOI"). Pursuant to Supreme Court Rule 29.6, EOI discloses that it a wholly owned subsidiary of Entergy Corporation. EOI does not have any nonwholly owned subsidiaries.

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One month before the Petition for Writ of Certiorari was filed in this matter, this Court denied certiorari on the identical issue of law arising out of the same circuit from which this Petition arises. *See Hines v. ABB Vetco Gray, Inc.*, 85 F.3d 624, *cert. denied*, 117 S. Ct. 737 (1997). Furthermore, this Court has denied certiorari on the issue in question on four previous occasions.[1] As set forth below, the reasons for denying certiorari two months ago are equally applicable now. Moreover, on March 17, 1996, petitioner filed a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60, which was pending in the disrict court at the time of the filing of this Opposition. For the foregoing reasons, respondent, Entergy Operations, Inc. ("EOI"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment entered by the United States Court of Appeals for the Fifth Circuit on November 6, 1996.

STATEMENT OF THE CASE

The Older Workers Benefit Protection Act ("OWBPA") codifies, in the context of claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, the well settled common law principle that any "waiver" of claims or causes of action must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). This case presents the question of whether the OWBPA also forecloses the entirely separate and distinct common law principle, reflected in the doctrines of ratification and estoppel, that a plaintiff may not pursue claims covered by an allegedly invalid release (*i.e.*, a contractual "waiver") while simultaneously retaining the consideration received in exchange for the release. The court below correctly concluded that the

1. *See Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 204 (1994); *Walmsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); and *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996).

OWBPA does not foreclose application of the doctrines of ratification and estoppel in the ADEA context.

Petitioner is a former EOI employee who worked in the Planning and Scheduling Department of the Waterford Steam Electric Generating Station ("Waterford 3") located in Killona, Louisiana. In 1994, EOI implemented a new employee evaluation process called the Management Planning & Review Ranking Process (the "Ranking Process"). Pursuant to the Ranking Process, all Waterford 3 employees categorized as salaried were to be forced ranked against their peers. These rankings were then transferred on to a nine box matrix, with Group 1 identifying employees who ranked high in both the potential and performance categories as compared to their peers and Group 9 identifying employees who ranked low in both of those categories as compared to their peers. Employees who fell in Group 9 were given the option of accepting a voluntary severance package and signing a release or striving to improve their performance by meeting the criteria set forth in individually developed action plans.

In connection with the Ranking Process, petitioner was ranked against all other salaried, non-managerial employees in the Planning & Scheduling Department and was determined to rank low as compared to her peers. As a result, petitioner ultimately fell into the Group 9 category and, at a January 17, 1995 meeting with her supervisors, was given the option of resigning and taking a voluntary severance package or beginning an action plan. At this meeting, petitioner was provided with a letter outlining the terms of the severance package and a release and was told that she had two weeks within which to make her decision.

During this two week period, the petitioner sought legal advice from two separate attorneys regarding the effect of the

release. She subsequently elected to sign the release and received all the benefits that were due her under the voluntary severance package.

In September 1995, petitioner filed this lawsuit against EOI, alleging that she was constructively discharged from her employment in violation of the ADEA and various state laws. Petitioner sought to invalidate her release as not "knowing and voluntary," alleging that the release did not comply with the OWBPA and that she was under economic duress at the time. However, despite seeking to avoid her obligations under the release, petitioner never offered to return to EOI any of the severance benefits that she received as consideration for the release.

The district court granted summary judgment to EOI. This decision was based upon settled Fifth Circuit law, established in *Walmsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th. Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), which holds that an employee's retention of benefits received as consideration for a release of claims operates as a ratification of an otherwise voidable contract. The Fifth Circuit subsequently affirmed the district court.

On March 17, 1997, petitioner filed a Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60. That motion was pending at the time of the filing of this Opposition.

REASONS FOR DENYING THE WRIT

I.

THE OWBPA DOES NOT FORECLOSE APPLICATION OF THE TRADITIONAL COMMON LAW DOCTRINES OF RATIFICATION AND ESTOPPEL IN THE ADEA CONTEXT.

Petitioner errs in suggesting that the OWBPA forecloses application of the traditional common law doctrines of ratification and estoppel in the ADEA context. By its terms, the OWBPA merely codifies a centuries-old principle, in the context of claims under the ADEA, that a "waiver" must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). In contending that this provision somehow abrogates the equally important common law principles of ratification and estoppel, petitioner not only gives short shrift to the words of the statute but also entirely ignores both the common law background against which the statute was enacted and the interpretive principles that apply to common law abrogation claims such as hers. Petitioner's various other arguments — based on the alleged lack of consideration, the alleged analogy to *Hogue v. Southern Railway,* 390 U.S. 516 (1968) (*per curiam*), and petitioner's own policy judgments about the wisdom of the common law — are also without merit.

Petitioner does not, and could not, dispute that her claim would be barred if the traditional common law doctrines of ratification and estoppel are applicable. At common law, releases tainted by fraud, mistake, or duress, like all other contracts, are voidable at the option of the defrauded, mistaken, or coerced party. *See, e.g., Morta v. Korea Ins. Corp.,* 840 F.2d 1452, 1455 n. 4 (9th Cir. 1988) (Guam law); *Ott v. Midland-Ross Corp.,* 523 F.2d 1367, 1368 (6th Cir. 1975) (federal common law under the ADEA). However, just as such releases can be avoided, they also can be ratified: "the releasor who retains consideration after learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms." *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank,* 936 F.2d 846, 850 (6th Cir. 1991), *cert. denied,* 502 U.S. 1034 (1992).[2]

Ratification does not constitute enforcement of the release as a contractual obligation. Rather, it rests on the distinct principle that " 'a party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations.' " *Dahlstrom Corp. v. State Highway Comm'n,* 590 F.2d 614, 616 (5th Cir. 1979) (citation omitted). Ratification, in other words, is based on principles of estoppel: the underlying claim is barred not because the plaintiff executed an allegedly invalid contractual *waiver* but because the plaintiff's *subsequent conduct* — in retaining the consideration paid to obtain the waiver — makes prosecution of the underlying claim fundamentally unfair. *See, e.g., Cumberland & Ohio Co.,* 936 F.2d at 850; *In re Texas Mortgage Servs. Corp.,* 761 F.2d 1068, 1076 (5th Cir. 1985); *Rachesky v. Finklea,* 329 F.2d 606, 609 (4th Cir. 1964).

Before the OWBPA was enacted, courts repeatedly applied these principles in the specific context of releases of claims under the ADEA. *See, e.g., O'Shea v. Commercial Credit Corp.,* 930 F.2d 358, 362 (4th Cir.) ("It is a well-established proposition that the retention of the benefits of a voidable contract may constitute ratification."), *cert. denied,* 502 U.S. 859 (1991); *Grillet v. Sears, Roebuck & Co.,* 927 F.2d 217, 220 (5th Cir. 1991) ("A party cannot be permitted to retain the benefits

2. *See also Fleming v. United States Postal Service AMF O'Hare,* 27 F.3d 259, 260 (7th Cir. 1994) (federal common law), *cert. denied,* 115 S. Ct. 741 (1995); *In re Boston Shipyard Corp.,* 886 F.2d 451, 455 (1st Cir. 1989) (federal common law); *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.,* 752 F.2d 178, 182 (5th Cir. 1985) (Texas law); *DiRose v. PK Management Corp.,* 691 F.2d 628, 633-34 (2nd Cir. 1982) (New York law), *cert. denied,* 461 U.S. 915 (1983).

received under a contract and at the same time escape the obligations imposed by the contract.").[3]

Although she contends that the OWBPA abrogates these settled common law doctrines in the ADEA context, petitioner ignores the basic interpretive rules that must govern any such claim. "[W]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.' " *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Indeed, this Court repeatedly has made it clear that, "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (*quoting Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). *See also Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed unless the language of a statute be clear and explicit for this purpose.' " (citation omitted)).

3. *See also Haslach v. Security Pacific Bank Oregon*, 779 F. Supp. 489, 493 (D. Or. 1991) ("Th[e] retention of the benefits [received for signing a release] is sufficient to amount to a ratification of the release agreement, regardless of whether it was initially signed under duress or misrepresentation."); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075, 1079 (E.D. N.C. 1991) ("By accepting and retaining the benefits of a release, a party to a voidable release ratifies the release and cannot avoid its obligations."); *Ponsoni v. Kraft General Foods, Inc.*, 774 F. Supp. 299, 316 (D. N.J. 1991) ("The acceptance of benefits ratifies the release of ADEA claims."), *aff'd*, 968 F.2d 14 (3d Cir. 1992); *Widener v. Arco Oil & Gas Co.*, 717 F. Supp. 1211, 1217 (N.D. Tex. 1989) ("[I]f the releasor retains the consideration after he learns that the release [is] voidable, his continued retention of the benefits constitutes a ratification of the release.").

This Court repeatedly has applied these familiar interpretive principles to the federal antidiscrimination statutes. Specifically, the Court has made clear that, absent a clear statutory intent to abrogate, provisions in antidiscrimination statutes, like those in any other statute, remain subject to common law principles such as waiver, ratification, or estoppel. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-27 (1991) (right to trial subject to waiver in favor of arbitration); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393-94 (1982) (limitations defenses subject to waiver, estoppel, and equitable tolling); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) (EEOC right of action subject to laches); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (private right of action subject to laches).

Nothing in the OWBPA "speaks directly" to, much less rejects, the settled common law principles of ratification and estoppel. The OWBPA merely provides that "[a]n individual may not waive any right or claim" under the ADEA "unless the waiver is knowing and voluntary," and it specifies certain "minimum" requirements that waivers must satisfy in order to be "knowing and voluntary." 29 U.S.C. § 626(f)(1). It says absolutely nothing about abrogation of the distinct doctrines of ratification and estoppel.

In arguing to the contrary, petitioner essentially contends that the OWBPA modifies antecedent common law standards. In large measure, however, the OWBPA merely *codifies* settled principles of federal common law, under which any waiver of statutory or constitutional rights, by contractual release or otherwise, must be knowing and voluntary. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995); *Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Moran v. Burbine*, 475 U.S. 412, 427 (1986); *Alexander v. Gardner-Denver*, 415 U.S. 36, 52 and n. 15 (1974); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). Moreover, the specific OWBPA standards for determining

whether a contractual waiver is "knowing and voluntary" largely mirror the common law standards that many courts of appeals previously had used for that purpose. *See, e.g., O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 401-02 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 517-18 (3d Cir. 1988).

At common law, for example, courts had considered "the clarity of the written agreement" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, a waiver must be "written in a manner calculated to be understood" (29 U.S.C. § 626(f)(1)(A)). At common law, courts had considered "whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, the waiver must be "in exchange for consideration in addition to anything of value to which the individual already is entitled" (29 U.S.C. § 626(f)(1)(D)). At common law, courts had considered whether an employee "was represented by or consulted with an attorney" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, an employee must be "advised in writing to consult with an attorney" (29 U.S.C. § 626(f)(1)(E)). At common law, courts had considered "the amount of time the plaintiff had possession of or access to the agreement before signing it" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, an employee must be given a specified period of time to consider the waiver (29 U.S.C. § 626(f)(1)(F)). In short, the OWBPA is hardly the emphatic repudiation of the common law that petitioner would make it out to be.

Indeed, as observed by the Fourth Circuit in *Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996), Congress's reliance upon the common law terms "knowing and voluntary" suggests that Congress "was defining only those circumstances in which a contract would be voidable, not when it would be

void." "[I]f anything, the text of OWBPA lends support to that holding through its implicit recognition that an ADEA release agreement that does not meet the OWBPA's requirements is merely a voidable, not a void contract." *Id.*

The conclusion that a release which fails to satisfy the OWBPA's requirements is merely voidable, and thus subject to ratification, is further bolstered by Congress's inclusion in the OWBPA of § 626(f)(1)(G). This section expressly provides for a seven day period after the execution of a waiver agreement during which an employee may revoke the agreement. It also provides that the agreement does not become enforceable until the expiration of the seven day revocation period. 29 U.S.C. § 626(f)(1)(G). "If noncompliance with the other subparts . . . rendered the agreement void there would be no need for subpart (G)." *Walmsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995). Surely Congress would not give an employee the right to void a non-complying release, as provided in subpart (G), if such a release were void *ab initio*. The petitioner has failed to present any evidence that Congress intended such an anomalous result.

Finally, petitioner advances a series of arguments based on the alleged analogy to *Hogue v. Southern Railway*, 390 U.S. 516 (1968), her own policy judgment that the doctrines of ratification and estoppel are unwise, and her claim that she did not receive consideration for the release of claims. Petitioner's arguments are not based in fact or law and, thus, are insufficient to support her claim.

Petitioner asserts that the OWBPA should be construed as the Federal Employers Liability Act ("FELA") was construed in *Hogue*. Pet. 21-22. In *Hogue*, this Court held that a plaintiff, in order to prosecute claims under FELA, need not tender back the consideration paid to him for a release allegedly invalid on

the ground of mutual mistake. *See* 390 U.S. at 517. For several reasons, however, petitioner's proposed analogy to *Hogue* is unsound.[4]

To begin with, *Hogue* on its face is a poor candidate for the dramatic extension, from the FELA to the ADEA, urged by petitioner. In *Hogue*, after this Court granted certiorari, the respondent employer purported to confess error and refused to present either briefing or oral argument on the tender requirement at issue there. *See id.* at 516. The Court issued a terse three-page *per curiam* opinion, rendered without the benefit of adversary presentation and limited by its terms to claims under FELA and releases challenged on the ground of mutual mistake. *See id.* at 517. Not surprisingly, petitioner can cite no other decision of this Court, in the quarter-century since *Hogue* was decided, or in the two centuries before it was decided, foreclosing application of the doctrines of ratification and estoppel in any other context.

Moreover, the Fifth Circuit has correctly concluded that *Hogue's* FELA holding cannot fairly be extended beyond the "unique" context of that particular statute. *Walmsley,* 11 F.3d at 540. The FELA provides a federal remedy for railroad workers injured by the negligence of their employer. As the *Walmsley* court explained, however, the FELA was designed not only to "discourage negligent conduct" by employers, but to actively "facilitat[e] recovery by injured railroad workers." *Id. See also Kernan v. American Dredging Co.,* 355 U.S. 426, 432 (1958) (FELA designed "to provide for liberal recovery"). To achieve

4. The authority upon which petitioner relies to challenge the application of ratification and estoppel is based primarily on *Hogue. See Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993), *cert. denied,* 114 S. Ct. 2104 (1994); *Forbus v. Sears, Roebuck and Company,* 958 F.2d 1036 (11th Cir. 1992); *Isaacs v. Caterpillar, Inc.,* 765 F. Supp. 1359 (C.D. Ill. 1991); and *Constant v. Continental Telegraph Co.,* 745 F. Supp. 1374 (C.D. Ill. 1990).

that goal, a "primary purpose" of the statute was "to eliminate a number of traditional defenses to tort liability." *Atchison T. & S.F. Ry. v. Buell,* 480 U.S. 557, 561 (1987). *See also Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 507-08 (1957) ("The employer is stripped of his common law defenses."). In particular, the FELA expressly states that "[a]ny contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under this chapter, shall to that extent be *void.*" 45 U.S.C. § 55 (emphasis added). The OWBPA, by contrast, does not render contractual waivers "void," but merely requires them to be "knowing and voluntary" under specified standards. 29 U.S.C. § 626(f)(1). Thus, *Hogue* provides no support for petitioner's proposed construction of the OWBPA to foreclose application of the doctrines of ratification and estoppel in the ADEA context.

Petitioner also advances a series of "policy" arguments (Pet. 22-23) that amount to a thinly-veiled contention that the doctrines of ratification and estoppel are unwise and unfair. Of course, these arguments are all legally irrelevant, since the pertinent question is not the wisdom or fairness of these doctrines, but whether the OWBPA has "directly" abrogated them. *See United States v. Texas,* 507 U.S. at 534 (citation omitted). Even on their own terms, however, petitioner's policy arguments lack merit.

The issue in this case is very simple: whether an employee who receives severance compensation in exchange for a release of, *inter alia,* an age discrimination claim, may retain such compensation while challenging the release by suing the employer for age discrimination. The answer must be no. A contrary answer would permit the employee to finance litigation against his or her employer with the same funds the employer paid the plaintiff as consideration for a release from such

litigation. As recognized by the Fourth Circuit in *Blistein*, a plaintiff simply cannot have it both ways.[5]

The courts which have rejected the ratification argument have expressed concern that such a rule would "chill" legitimate age discrimination suits. *See, e.g., Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991). Such a concern simply does not comport with reality. It is undisputed that the overwhelming majority of plaintiffs enter into contingent fee arrangements with their lawyers, whereby the costs of litigation are taken from the ultimate recovery. One cannot seriously argue that the Fifth Circuit's tender back rule "chills" contingent fee agreements. Moreover, requiring a plaintiff to tender back severance/release consideration merely requires the plaintiff to return to the position in which he or she would have been absent the severance agreement: with the ability to file a lawsuit but without the compensation the employer paid to avoid a lawsuit.

Rather than "chill" lawsuits filed by plaintiffs, a refusal to require a tender back in ADEA cases would more likely "chill" settlements or an employer's willingness to offer such added severance benefits. If confronted with such a rule, employers would have reduced incentive to prospectively settle possible age cases or to provide employees with extra severance compensation in exchange for a release. Fearing a technical violation of the OWBPA, employers would be more inclined to retain severance benefits to finance the defense of the age cases that are actually filed.[6] This result would run contrary to the

5. In *Blistein*, the Fourth Circuit concluded: "If we were to follow *Oberg* ... we would allow persons like [the plaintiffs] to have it 'both ways,' to retain the benefits that they receive pursuant to their retirement agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended. This, we find no evidence Congress contemplated." 74 F.3d at 1466.

6. In *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d (Cont'd)

ADEA's express purpose of helping employers and workers find a way of meeting problems arising from the impact of age on employment. *See* 29 U.S.C. § 621(b).

Petitioner also claims that she did not receive consideration for the release agreement at issue. Her argument that she was already entitled to the amounts paid to her, without signing a release, is conclusory and not supported by the evidence. Petitioner bases her position on the fact that: (1) employees who had been *involuntarily* terminated in 1994 did not have to sign releases in order to receive severance benefits and (2) employees who opted participate in voluntary severance programs offered by EOI in late 1995 — approximately ten months after petitioner resigned her position — received more money in exchange for their releases than she did. Pet., 16.

As the evidence presented to the district court establishes, the *involuntary* severance packages used in 1994 were implemented prior to the Ranking Process and were used in connection with downsizing efforts within the company. Furthermore, although employees who were severed during that time period were not required to execute releases, these people were *involuntarily* terminated. Prior to the time petitioner resigned, EOI adopted a policy whereby any employee who opted to participate in a *voluntary* severance program was required to execute a release of claims in order to receive severance benefits. Further, with respect to the additional amounts offered employees as part of a voluntary severance program implemented by EOI in late 1995, those packages are irrelevant as they were offered as part of a downsizing effort that took place after petitioner resigned.

(Cont'd)

259, 260-61 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995), the Seventh Circuit endorsed the principle that the tender back rule makes releases more valuable to employers and encourages voluntary settlements, which benefits both employees and employers in the long run.

Petitioner fails to cite any authority in support of her contention that an employer cannot adopt new and different severance programs over time. Indeed, such a restriction would place an employer in the position of being unable to adjust in response to shifting economic and business considerations. For example, under petitioner's argument, if, at some point in the future, an employer offered a more favorable voluntary severance program to its employees than had been offered in the past, all employees who participated in the earlier program would be permitted to come back and claim that they did not receive adequate consideration. This is illogical, and its practical effect would be to bring the use of severance programs by employers to a screeching halt.

Simply put, petitioner offers no evidence that she was entitled to the benefits she received if she had refused to sign a release. To the contrary, the evidence establishes that the voluntary severance package petitioner was offered required her to sign a release and that, without the release, petitioner would not have been paid any severance benefits. Thus, the money petitioner received clearly was consideration to which she was *not* already entitled.[7]

II.

THE ALLEGED CIRCUIT CONFLICT IS NOT APPROPRIATE FOR REVIEW AT THIS TIME.

Petitioner also argues that this Court should grant certiorari to resolve an alleged split between the Fifth Circuit and the Seventh and Eleventh Circuits.[8] However, upon scrutiny, it is

7. Petitioner also fails to explain why this Court should consider the highly factual issue of whether she received consideration in this individual case.

8. Petitioner does not address the fact that one panel decision out of (Cont'd)

apparent that the alleged conflict is, at best, undeveloped. As Justice Harlan explained, certiorari should be denied "where it seems likely that the conflict may be resolved as a result of further cases in the Courts of Appeals." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 112 (1959). This is such a case. Recent jurisprudence from the Seventh Circuit signals a shift toward possible adoption of the tender back requirement. Further, the Eleventh Circuit has not readdressed the tender back issue since its 1992 pre-OWBPA decision in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992) and, consequently, has failed to analyze many arguments supporting the tender back requirement.

Petitioner correctly notes that, in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 679 (1994), a Seventh Circuit panel held that an ADEA plaintiff need not tender back the consideration paid to him for an allegedly invalid release in order to proceed with a lawsuit. *See id.* at 683. However, recent jurisprudence from the Seventh Circuit signals a shift toward possible adoption of the tender back requirement. *See, e.g., Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995).

In *Fleming*, the Seventh Circuit enforced a tender back requirement where the plaintiff challenged the validity of a release of her Title VII and Rehabilitation Act claims. Speaking

(Cont'd)
the Fourth Circuit recently upheld the tender back requirement in the context of the OWBPA, while two panels out of the Third and Sixth Circuits rejected the tender back requirement. *See Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996); *Long v. Sears, Roebuck & Company*, 105 F.3d 1529 (3rd Cir. 1997); and *Raczak v. Ameritech Corporation*, 103 F.3d 1257 (6th Cir. 1997). However, as discussed herein, these decisions do not warrant granting certiorari on this issue at this time.

through Chief Judge Posner, a unanimous panel (Eshback and Easterbrook, JJ.) cited the Fifth Circuit's *Walmsley* decision — with approval — for the proposition that "a release can be rescinded only upon a tender of any consideration received." 27 F.3d at 260-61. The Seventh Circuit held that, because the tender back rule is a widely accepted "general principle of contract law," it "would surely be a component of any federal common law of releases." *Id.* The Seventh Circuit explained in detail how this rule, by making releases more valuable to employers, and thus encouraging voluntary settlements, helps both employers and employees in the long run. "The tender requirement is not a remedy. It is a protection for defendants, although it may as we have noted benefit plaintiffs in the long run too; a premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract." *Id.* at 262.

Addressing age discrimination cases specifically, the Seventh Circuit commented that the common law rule "*may* have to give way," but noted that the Fifth Circuit in *Wamsley* had "strongly criticized our decision in *Oberg*." *Id.* at 261 (emphasis supplied). Tellingly, the Seventh Circuit referred to *Oberg* and its progeny as follows: "The idea behind these cases . . . is a little obscure to us." *Id.* (citations omitted). Thus, it is possible that this Court's intervention will not be necessary to correct any perceived conflict between the Fifth and Seventh Circuits, as the latest jurisprudence from the latter circuit appears to signal a shift toward adoption of the tender back requirement in employment cases generally.

Petitioner also cites the Eleventh Circuit's *Forbus* decision as evidence of a conflict. Initially, as noted, *Forbus* was a pre-OWBPA decision. In *Forbus*, the Eleventh Circuit relied almost entirely on this Court's holding in *Hogue* to reject a tender back requirement, stating that neither the Fifth Circuit nor the Fourth

Circuit had considered the *Hogue* decision in their analysis of the issue.[9] *Forbus*, 958 F.2d at 1040-41. Following the *Forbus* decision and the enactment of the OWBPA, the Fourth and Fifth Circuits were presented with opportunities to extend the *Hogue* rationale to claims brought under the ADEA, but both declined to do so. *See Walmsley*, 11 F.3d at 540-42 and *Blistein*, 74 F.3d at 1465-66 (4th Cir. 1996). Importantly, the Eleventh Circuit has not revisited the issue since *Forbus*, and, as a result, has not addressed the subsequent analysis of the issue out of the Fifth and Fourth Circuits.[10] Thus, this Court's intervention at this time would be premature.

Finally, although panels in the Third and Sixth Circuits recently rejected the tender back requirement, neither decision was unanimous,[11] the employer in the Sixth Circuit has a pending application for rehearing *en banc*, and the Sixth Circuit has ordered that an opposition to the rehearing application be filed.[12]

This Court has indicated repeatedly in recent years that the precise judicial disagreement alleged by petitioner does not presently warrant further judicial review. Indeed, the petitioners in *Oberg* and *Walmsley*, and more recently in *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert.*

9. *Forbus* addressed the Fifth Circuit's decision in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) and the Fourth Circuit's decision in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991), both pre-OWBPA cases.

10. As the Fourth Circuit explained in *Blistein*, 74 F.3d at 1466, the OWBPA itself contains strong textual indications that the tender-back requirement *does* apply to claims under the ADEA.

11. Indeed, none of the three separate opinions in *Raczak* has any precedential significance. The controlling opinion in that case is the separate concurrence of Judge Gray, which is expressly limited "to the facts" of that case. 103 F.3d at 1271.

12. On March 11, 1997, the Third Circuit entered an order denying rehearing *en banc*.

denied, 116 S. Ct. 1042 (1996) and *Hines v. ABB Vetco Gray, Inc.*, 85 F.3d 624, *cert. denied*, 117 S. Ct. 737 (1997), sought writs of certiorari from this Court on this very issue and were rejected. Considering the Seventh Circuit's apparent shift toward the tender back rule, the fact that the Eleventh Circuit has not addressed the issue since the enactment of the OWBPA, and the fact that an application for rehearing *en banc* is pending in the Sixth Circuit, this Court's intervention at this time may well be premature and ultimately unnecessary.

CONCLUSION

For the reasons set forth herein, the Court should deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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OCTOBER TERM, 1997

DOLORES M. OUBRE
Petitioner,

vs.

ENTERGY OPERATION, INC.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY, 4, 1997
CERTIORARI GRANTED APRIL 21, 1997

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APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 95-3168
	*	
ENTERGY OPERATIONS,	*	
INC.	*	SECT. C MAG. 4
	*	
	*	JURY TRIAL DEMAND

* * * * * * * * * * * * * * * * *

COMPLAINT

NOW INTO COURT, through undersigned counsel, comes DOLORES M. OUBRE, a person of the full age of majority and resident of the Parish of Jefferson, State of Louisiana, who respectfully represents:

I.

Made defendants herein are Entergy Operations, Inc., a domestic corporation authorized to do and doing business in the State of Louisiana; Jim Rooney, in his official capacity as the Supervisor of Outage Planning for Entergy Operations Inc. at Waterford III Facility located in Killona, Louisiana; and Dave Shipman in his official capacity as Manager of Planning and Scheduling for Entergy Operations, Inc. the Waterfore III Facility located in Killona, Louisiana.

II.

This civil action is brought on behalf of the claimant, a forty-one (41) year old female, for money damages to redress injury caused to the claimant by the deprivation of her rights and privileges as secured by Title 29 U.S.C. § 621-634, the Age Discrimination of Employment Act of 1967 ("ADEA"), as amended in 1978 and 1991.

III.

Further, this action is brought pursuant to Louisiana Revised Statute Article 23:972 and 51:2231, et seq. This Court has jurisdiction under Title 28 United States Code, § 1343.

IV.

Claimant was hired to begin work as a Clerk B for the defendant in June of 1987. By 1995, claimant had been promoted to an Assistant Scheduler at the Waterfore III Facility located in Killona, Louisiana.

V.

Defendant, Entery Operations, Inc., employed greater than eight (8) employees during all times pertinent hereto.

VI.

During her tenure with Entergy Operation, Inc., the claimant performed her duties loyally and capably.

VII.

On January 16, 1995, the claimant received an evaluation rank "9" from Jim Rooney, Planning & Scheduling Supervisor, and Dave Shipman, Planning & Scheduling Manager, and was given the option by Jim Rooney, Planning & Scheduling Supervisor, and Dave Shipman, Planning & Scheduling Manager, of accepting a severance package or an action plan.

VIII.

The claimant was required to make a decision within fourteen (14) days, was not given the opportunity to change her mind once decided and was told that her performance rating would not change even if she successfully completed her action plan.

IX.

The claimant selected the option of the severance package and her job responsibilities were then disbursed to the remaining assistant schedulers all of them younger than the claimant.

X.

In spite of being qualified for her position, the claimant was constructively discharged because of her age in violation of the Age Discrimination of Employment Act and violation of State Law.

XI.

Claimant satisfied her procedural prerequisite of timely filing a Charge of Discrimination with the Equal Employment Opportunity Commission. Further, plaintiff received a right to sue letter from the Commission upon request and has filed this complaint timely.

XII.

Defendant intentionally and willfully deprived the claimant of her federal rights and privileges by violating the provisions of the Age Discrimination of Employment Act.

XIII.

As a result of the intentional and willful acts of the defendant in unlawfully discharging the claimant, the claimant is entitled to an award of actual damages, back pay including but not limited to the salary claimant could have received if not for termination, salary increases, bonuses, vacation and sick leave benefits, liquidated damages, general damages including pain and suffering, mental anguish and attorney's fees.

XIV.

Claimant requests a trial by jury on all issues triable by same.

WHEREFORE, claimant, DOLORES M. OUBRE, prays that the defendant be cited to appear and answer this complaint and after due proceedings be had, there be judgment

herein in favor of the claimant, DOLORES M. OUBRE, and against the defendant, ENTERGY OPERATIONS, INC., for actual damages, back pay, liquidated damages, compensatory damages, attorney's fees together with all costs and legal interests. Claimant further prays for trial by jury on all issues triable by same.

Respectfully submitted,

DONELON, HAYNIE & DONELON

By: s/s Barbara G.Haynie,

Barbara G. Haynie, # 19340
3445 N. Causeway Boulevard
Suite 1010
Metairie, Louisiana 70002
(504) 838-0077

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 95-3168
	*	
ENTERGY OPERATIONS,	*	
INC.	*	SECTION "C"
	*	
	*	MAGISTRATE
	*	DIVISION 4
	*	

* * * * * * * * * * * * * * * * *

ENTERGY OPERATIONS, INC.'S ANSWER AND DEFENSES

Defendant Entergy Operations,Inc. ("EOI" or "defendant"), through undersigned counsel, responds to the Complaint filed by plaintiff, Dolores M. Oubre ("plaintiff"), as follows:

FIRST DEFENSE

In specific response to the numbered and unnumbered paragraphs of the Complaint, EOI states:

1.

EOI denies the allegations contained in the unnumbered paragraphs of the Complaint.

2.

In response to Paragraph I of the Complaint, EOI admits that Entergy Operations, Inc. is a Delaware corporation authorized to do and doing business in the State of Louisiana, James P. Rooney is Supervisor for Outage Planning for EOI at the Waterford 3 facility located in Killona, Louisiana ("facility"), and David L. Shipman is Manager of Planning and Scheduling for EOI at the same facility. Defendant EOI denies all remaining allegations contained in Paragraph I of the Complaint.

3.

Defendant EOI denies the allegations contained in Paragraph II of the Complaint.

4.

Defendant EOI denies the allegations contained in Paragraph III of the Complaint.

5.

In response to Paragraph IV of the Complaint, EOI admits that plaintiff began working as a Clerk B for EOI in June, 1987 and that in early 1995, prior to her voluntary resignation, plaintiff's position was Assistant Outage

Scheduler at the facility. Defendant EOI denies all remaining allegations contained in Paragraph VII of the Complaint.

6.

In response to Paragraph V of the Complaint, Defendant EOI admits that it employed more that eight (8) employees during 1995.

7.

Defendant EOI denies the allegations of Paragraph VI of the Complaint.

8.

In response to Paragraph VII of the Complaint, defendant EOI admits that, on January 16, 1995, James P. Rooney, the Planning and Scheduling Supervisor, and David L. Shipman, the Planning and Scheduling Manager met with plaintiff, informed her that she had an evaluation ranking of 9 and that she had the options of continuing employment based on an action plan or voluntarily choosing a severance package. Defendant EOI denies all remaining allegations contained in Paragraph VII of the Complaint.

9.

Defendant denies the allegations of Paragraph VIII of the Complaint.

10.

In response to Paragraph IX of the Complaint, defendant EOI admits that plaintiff voluntarily chose the option of the severance package. Defendant EOI denies all remaining allegations contained in Paragraph IX of the Complaint. Defendant EOI specifically avers that plaintiff signed a release waiving all claims pertaining to her employment and voluntary resignation, including those raised in plaintiff's Complaint.

11.

Defendant EOI denies the allegations contained in Paragraph X of the Complaint.

12.

In response to Paragraph XI of the Complaint, defendant EOI admits that plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") naming EOI as respondent. Defendant EOI denies all the remaining allegations contained in Paragraph XI of the Complaint.

13.

Defendant EOI denies the allegations contained in paragraph XII of the Complaint.

14.

Defendant EOI denies the allegations contained in Paragraph XIII of the Complaint.

15.

Paragraph XIV of the Complaint requires no answer; if any answer is required, defendant EOI denies the allegations of Paragrah XIV of the Complaint.

SECOND DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

Jurisdiction does not lie with this court because plaintiff has failed to satisfy all of the jurisdictional prerequisites to filing a suit in federal court under the Age Discrimination in Employment Act (ADEA).

FOURTH DEFENSE

Plaintiff's claims are barred by failure to exhaust administrative prerequisites to suit under the federal and/or state statutes cited in the Complaint.

FIFTH DEFENSE

Plaintiff received considertion for and signed a separation agreement releasing and waiving all claims stated in her Complaint. Plaintiffs claims are barred by the doctrines of waiver and/or equitable estoppel.

SIXTH DEFENSE

Defendant EOI made decisions with respect to plain-

tiff's employment based on reasonable factors other than age.

SEVENTH DEFENSE

Plaintiff's claims are barred in whole or in part by failure timely to adhere to administrative prerequisites to suit under the federal and/or state statutes cited in the Complaint.

EIGHTH DEFENSE

Plaintiff's claims are barred in whole or in part because plaintiff has failed to mitigate her alleged damages.

NINTH DEFENSE

Liquidated damages are not available under the state statutes cited in the Complaint and/or are not available in an ADEA action when the employer's conduct was not willful; therefore, plaintiff has failed to state a claim upon which the relief of liquidated damages may be granted.

WHEREFORE, defendant Entergy Operations, Inc. prays that its Answer be deemed good and sufficient, and that, after due proceedings are had, that there be judgment in its favor and against Dolores M. Oubre, dismissing plaintiff's Complaint, with prejudice, at all costs to plaintiff, including attorney's fees, and for all further general and equitable relief to which defendant EOI may be entitled.

MONROE & LEMANN
Anne L. Lewis, Bar No. 18304

By /s/ Anne L. Lewis
201 St Charles Avenue, # 3300
New Orleans, LA 70170-3300
Telephone: (504) 586-1900

ATTORNEYS FOR DEFENDANTS, ENTERGY OPERATIONS, INC., JAMES P. ROONEY AND DAVID L. SHIPMAN

Kenneth P. Carter, Bar No. 3933
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P.O. Box 61000
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New Orleans, Louisiana 70113
Telephone: (504) 576-2761

ATTORNEYS FOR DEFENDANTS, ENTERGY OPERATIONS, INC., JAMES P. ROONEY AND DAVID L. SHIPMAN

CERTIFICATE

I certify that a copy of the foregoing Entergy Operations, Inc.'s Answer has been served upon counsel of record:

Barbara G. Haynie
Donelon, Haynie & Donelon
3445 N. Causeway Blvd.
Suite 1010
Metairie, Louisiana 70002
Couinsel for Dolores M. Oubre

by depositing same in the United States mail, postage paid and properly addressed, this 20th day of November, 1995.

/s/ Anne L. Lewis

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE	CIVIL ACTION
VERSUS	NUMBER: 95-3168
ENTERGY OPERATIONS, INC.	SECTION "C" (4)

FILED
MAY 23 1996

ORDER AND REASONS

This matter comes before the Court on motion for summary judgment filed by the defendant, Entergy Operations, Inc. ("Entergy"). Having considered the record, the memoranda of counsel and the law, the court has determined that the summary judgment should be granted for the following reasons.

The undispued facts reveal that the plaintiff, Dolores M. Oubre ("Oubre") worked for the defendant, Entergy Operations, Inc. ("Entergy") as a salaried employee at the Waterford Steam Electric Generating Station. In 1993, she received a poor work performanc ranking from Entergy. All employees who received such rankings were offered the option of accepting a voluntary severance package and signing

DATE OF ENTRY MAY 23 1996

a release of claims or improving their performance by meeting the criteria of individually developed action plans. She was informed of her ranking and her options at a meeting with James Rooney ("Rooney") and David Shipman on January 17, 1995. She was given a letter containing the terms of the severance package and release and two weeks within which to make her decision.

On January 31, 1995, the plaintiff advised Rooney of her decision to accept the voluntary severance package and she signed the release. The release reads in relevant part as follows:

> I, Dolores M. Oubre, knowingly, voluntarily, and for valuable consideration agree to waive, settle, release and discharge any and all claims, demands, damages, actions, or causes of action occurring on or before the date of the execution of this Release, whether known or hereafter discovered, that I may have against Entergy Operations, Inc., its parent corporation, subsidiaries, affiliates, officers, directors, employees, agents, and legal representatives and their respective successors, heirs, and assigns ("the Company"), which in any way relate to my employment by or my separation from the Company.
>
> I acknowledge that I was provided with a copy of this Release, that I was advised to discuss this Release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claims covered by this Release, I am waiving

> potentially valuable rights by signing below. My execution of this Release is free and voluntary and was not procured through duress, coercion, or undue influence.
>
> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT BE OTHERWISE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT.

The plaintiff has admitted in deposition that she understood the terms of the severance package, consulted with two attorneys about the effect of the release, received all monies under the severance package and has returned no money to Entergy.

Based on these undisputed facts, Entergy argues that the plaintiff has waived her right to bring this action because she signed the release and later ratified it by failing to return the benefits she received as a result of the severance. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 1403 (1995). The plaintiff argues that the release did not comply with the requirements of the Age Discrimination in Employment Act ("ADEA")m 29 U.S.C. §621 *et seq*, and its 1990 amendment, the Older Workers Protection Act ("OWBPA"), 29 U.S.C. §626(f) (A)-(H) and that the rationale adopted by the Fifth Circuit in *Wamsley* is erroneous.

The OWBPA provides that an individual cannot waive any right or claim under the ADEA unless the waiver is "knowing and voluntary" and provides that unless the waiver meets certain minimum criteria it may not be considered "knowing and voluntary." It is undisputed that the release signed by the plaintiff did not meet some of these criteria, including the requirements that specific reference to ADEA rights be made, that a waiting period of at least 45 days within which to consider the agreement be given and that a seven day period following execution to revoke the agreement be provided. 29 U.S.C. §626(f) (B), (F). (G).

The Fifth Circuit has specifically held however that the failure to meet the requirements of subsections (A) through (H) of the OWBPA does not render the agreement void of legal effect even though not "knowing and voluntary." *Wamsley*, 11 F.3d at 539. Rather, such waivers are only subject to being avoided at the employee's option. According to *Wamsley*, where the employee chooses to retain and not tender back the benefits paid in consideration for the agreement, she manifests an intention to be bound by the waiver and makes a new promise to abide by its terms. *Wamsley*, 11 F.3d at 540. *See also: Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1042 (1996).

The undisputed facts here fit squarely into the rule set forth in *Wamsley* and affirmed in *Blakeney*. This Court is not at liberty to disregard the law announced by the Fifth Circuit.

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by the defendant, Entergy Operations, Inc. is hereby GRANTED.

New Orleans, Louisiana, this 23 day of May, 1996.

/s/ Ginger Berrigan

UNITED STATES DISTRICT JUDGE

Notice sent to:

Barbara G. Haynie, Esq.
Kenneth Paul Carter, Esq.
Anne L. Lewis, Esq.
Rosemarie Falcone, Esq.

APPENDIX F

A-6

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-30654
Summary Calendar

DOLORES M. OUBRE
Plaintiff-Appellant,

VERSUS

ENTERGY OPERATION, INC.
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(95-CV-3168-C)

BEFORE GARWOOD, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Dolores M. Oubre appeals from the district court's grant of summary judgment in favor of her employer, Entergy Operations, Inc., in her age discrimination action.

[1]Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.4.4.

We have reviewed the record and the parties' briefs and find no reversible error. Accordingly, the judment is AFFIRMED for the reasons enunciated by the district court.

APPENDIX G

CONFIDENTIAL

(1)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DOLORES M. OUBRE Plaintiff	*	CIVIL ACTION No. 95-3168
VS	*	SECTION "C"
ENTERGY OPERATIONS, INC. JAMES P. ROONEY, AND DAVID L. SHIPMAN Defendants	*	JUDGE BERRIGAN MAGISTRATE 4

COPY

Deposition of DOLORES M. OUBRE, taken on Friday, April 12, 1996, at the offices of Entergy Services, Inc., 639 Loyola Avenue, Suite 2600, New Orleans, Louisiana 70113.

EXHIBIT A to Plaintiff's Opposition to Defendants Motion for Summary Judgment filed in the District Court Proceeding.

(7)

reporter can take it down. If I'm talking, will you please let me finish my question before you start your answer?

A. Yes.

Q. And I'll try to let you finish your answer before I ask the next question, although sometimes it doesn't work that way. If you give an answer and you later think your answer is incomplete or that it's incorrect, will you please stop me and let me know that you gave an incorect or incomplete answer?

A. Yes.

Q. If you need to take any breaks, would you let me know? And as long as there is not a question pending, we can just break.

A.Okay.

Q. Are you currently on any medications or anything like that that would stop you from giving your deposition today?

A. No.

Q. Are you married?

A. No.

Q. How old are you?

A. Forty-two.

Q. When was your birth date?

(11)
told them that I felt like that was an injustice to me because I already was overloaded. And I felt like I bent over backwards helping them do anything that they needed to do. So I asked for a raise, and they declined. So I resigned.

Q. After leaving the hospital in 1981, where did you next go to work?

A. Straight — I left the hospital in '81, and two weeks later, I was hired at Waterford 3.

Q. Were you hired as — I guess at that time it would have been —

A. LP&L.

Q. It was still LP&L?

A. It was LP&L at that time.

Q. Were you hired as an employee of LP&L?

A. No. The first three months I was there, I was hired by AMPM, which is a temporary service. I interviewed with the personnel, and he hired me. No, I take it back. It wasn't AMPM. It was Bonjour Temporary Service. I interviewed with Clayton — I can't remember his last name. And he
(12)
hired me. And that particular day, he sent me to Bonjour to fill out the paperwork, and I started employment there the next day.

Q. You said you interviewed with Clayton. Now, was he an LP&L person?

A. Right, Clayton Taravella. Right. I worked for Bonjour for three months.

Q. And Bonjour —

A. — was a temporary service.

Q. So you went to work for Bonjour for a three-month period in 1981 after the —

A. Right.

Q. But you were working on site at Waterford; is that correct?

A. Right. Yes.

Q. What were you doing at Waterford?

A. I was working for Hal Canavier in the mechanical maintenance department.

Q. Do you recall what your title was?

A. Oh, God. I really don't.

Q. Do you recall what your job duties were?

A. Yeah.

Q. What were they?

A. At that time the plant was in the

(15)
change?

A. No. The only thing that changed at that time was now I was being paid by Ebasco rather than Bonjour.

Q. How long did you work with Ebasco?

A. Six and a half years.

Q. So you were with Ebasco from about 1981 until 1987?

A. Until June 1987.

Q. While you were with Ebasco, were you doing the same job function that you had just described to me?

A. No. I worked for Hal for approximately 2 1/2 years maybe. I mean, it was so long ago, it's hard for me to remember exact. After that I moved to Planning & Scheduling. There were greater opportunities in Planning & Scheduling. I had kind of gotten bored with the work that I was doing because it was repetitive. And I saw more opportunities for growth and advancement in Planning & Scheduling. And I just thought that I would be happier there.

So I spoke to one of the guys that was in there at that time, and I asked if there
(16)
were any openings or could he see if there was any possibility of me moving to Planning & Scheduling. And I was very lucky, Within a matter of weeks, I moved over to P & S.

Q. What was your title, if you recall, in Planning & Scheduling?

A. I really don't remember. I remember my titles when I became an LP&L person, because they stressed that for growth and development. But as a contractor, that — I really don't remember.

Q. That's fine. I mean, if you don't remember, just tell me you don't remember.

A. Yeah. I really don't remember.

Q. When you got to Planning & Scheduling, who were you reporting to?

A. Mike Woodard was the Planning & Scheduling manager, and I believe at that time Jim Rooney was the supervisor.

Q. What were you doing day in, day out in Planning & Scheduling?

A. In Planning & Scheduling, we did — we tracked all of the CIWAs, which was Condition Identification Work Authorizations. That was the paperwork that entitled people to

(18)

Q. Between the time you got to Planning & Scheduling and the time you became an LP&L employee, did your job duties change at all?

A. Yes.

Q. When did they change?

A. Oh, gosh. Let me think. No, I retract that. No, I don't think so. I think they stayed the same until I became an LP&L employee.

Q. Did you continue to report to the same people?

A. I reported to, I think — yeah. I think during that time — it's been so long. But I think during that time. I reported to Jim.

Q. When did you become an LP&L employee?

A. June '87.

Q. How did that happen?

A. There was a job that became available, and Jim offered it to me.

Q. What job was that?

A. A Clerk B position. I think at that time it was titled "Clerk B" position.

(19)

Q. Was that in the Planning & Scheduling

department?

A. Yes.

Q. Were you paid hourly?

A. Yes.

Q. What were your job duties as a Clerk B?

A. I think at that time they basically remained the same. The CIWA program had changed from — the actual paperwork had changed, but the way we were doing business had not changed. We were still issuing all of the work authorizations. We were still tracking them. I think through — I don't think it changed until 1991 or '90, when I became a computer operator. Basically, the functions stayed the same up until then.

Q. So in '90 or '91, somewhere around there, you became a computer operator?

A. Yes.

Q. Was that a promotion for you?

A. Yes,

Q. Were you still being paid hourly?

A. Yes.

Q. How did you come to get this

(20)

promotion?

A. I had showed interest in the computer, in the HP system. I had started just learning little things on my own. And I believe — I don't recall if I asked Jim if there was a position available or if a position had become available. And Jim offered it to me, and I was very eager to take it. So I accepted that position.

Q. As a computer operator, what were your job duties?

A. Operating the system, bringing up the system, watching the people on the system, maintaining the system altogether, doing backups, making sure that our data was always there, forwarding jobs, taking all of the jobs off of the printer, running reports, making sure that our system was secure, doing maintenance on our system.

These were all duties that I — when I first took them over that I had absolutely no — not much knowledge on. I was trained by a person in our group at that time.

Q. What exactly is the purpose of the Planning & Scheduling department? I mean

(21)

what was you-all's function? That is what I would like to see if you can tell me a little bit about.

A. I would say that we were very — our department was customer oriented. We provided information and data to all of the departments on the plant site.

Q. So what type of information and data did you-all provide?

A. Well, all of the information that was input on the LCIWAs —

Q. And the LC is what?

A. I mean, CIWAs. Well, it's the same thing. LCIWA and CIWA is the same thing. It's a work authorization.

Q. Oh, okay. So that's an acronym?

A. Yeah. Yes, it's an acronym. I'm sorry. We gave information on like the status of the plant, where things were, how things were progressing.

Q. Like projects?

A. Right.

Q. Maintenance projects and —

A. Right.

Q. — things like that?

(22)

A. We had multiple databases with different information in each one where we retrieved data. We had people that were getting reports on a routine basis that we had to get out. We were very customer oriented. I would say that we provided the plant with very much information.

Q. Would people call you-all and request information?

A. Yes, uh-huh (affirmative).

Q. Is that how it worked?

A. People would call and request information. We also had a book with routine reports that we ran routinely. We — reports that weren't run routinely were called — we would get call-in requests, and then we would do them upon request.

Q. Would you actually have to create a program to run a report?

A. No. Most of the programs were already set up when I was in Planning — when I went to Planning & Scheduling, they were all set up. So it was just learning the programs and learning to be able to retrieve the information.

(23)

Q. How long were you a computer operator?

A. I was a Computer Operator I, I believe, for two years, and then I was promoted to a Computer Operator II, I believe, for two years prior to the next promotion. But during the Computer Operator II phase, I was introduced to the report writing. So for a while, I was doing both. I was doing the computer operator work and the report — the ad hoc report writing.

Q. So the computer operator work you're talking about would be the same work —

A. Yes.

Q. — that you've just described?

A. Right.

Q. What was the report writing?

A. Report writing was — we had multiple report writers that we used. It was retrieving information out of different databases and getting out information to people that needed these reports.

Q. So people would call and say, "I need a report that will tell me this"?

A. Exactly.

(28)

you-all why he was promoting you-all to assistant scheduler?

A. I really don't remember exactly. I remember there were changes that were going on at the time in the plant, and I do believe that the organizational chart was going to e changed. And in order to secure — this may be a rumor. I'm just saying what I heard — in order to secure our positions, they made us — they promoted everybody in the group to assistant schedulers. And at that time we were all salaried employees.

Q. So you had gone from being an hourly employee as a Computer Operator II to a salaried employe as an

assistant scheduler?

A. Right.

Q. Did you have any understanding of what Mr. Rooney's expectations of you-all as assistant schedulers were?

A. At that particular time?

Q. Right.

A. I believe he generally told us what the job entailed, but I don't think we really went into any specifics. Because I think at that time a decision was being made,

(36)

ever talk to you about the ranking process?

A. Prior to the ranking?

Q. Right. Did you know it was coming out?

A. Yes.

Q. How did you learn that the ranking process was coming out?

A. Dave called a departmental meeting.

Q. Do you recall when this was?

A. I would say a couple of months before it happened; but to give you a specific date, no.

Q. Probably the fall of '94?

A. I would say late summer, early September. September, something like that. Really, I don't remember.

Q. Was everyone in the department at this meeting?

A. Yes.

Q. What was explained to you during the meeting?

A. Dave said that there was going to be a ranking process, that we were going to be ranked on potentsial and performance, that the

(37)

department would be ranked. We had 18 employees, I do believe, at that time, and the department was going to be ranked 1 to 18. And if you fell in the nine category that they were looking to — well, let me retract.

He said that — we were told at that time that 10 percent — I do believe that we were told 10 percent of the department would be ranked a nine. So in our department, that would mean that would be two people.

He didn't go into any specific details on — like he didn't break down how potential would be — how they would rank potential or rank performance. Basically, at that time we were just told that you would be ranked on performance and potential and that 10 percent of the people — 10 percent would fall in that category.

Q. Did he give you any understanding of what would happen if you fell into a nine category?

A. Not at that time.

Q. Do you recall approximately how long this meeting took place or how long the meeting was?

(42)

A. No.

Q. How did you first learn of your rank?

A. Jim and Dave called me in a meeting.

Q. Where was this meeting?

A. In one of the work rooms.

Q. Was anyone present other than you, Jim, and Dave?

A. No.

Q. What exactly was said during the meeting?

A. Jim called me in the — Jim did the meeting, and Jim said, "Dolores, you fell into the nine category."

He said, "I have this — this is your Action Plan. This is your package. I have a package to offer you." At that particular time, he opened a package, and he said that I would have a choice to — I mean, the package offered me a month administrative leave and a week for every year that I was there. Or my other option was to take an Action Plan.

So I asked Jim what was the Action Plan. Jim said, "An action Plan would be

(43)

written for you." Jim never alluded to the fact that I would have any input on that Action Plan. He said that the Action Plan would be very difficult for me to maintain. Jim said that because other people were in their same jobs and that I would be given a new Action Plan to do that he did not feel that I would — that I could do the Action Plan and better myself from a nine.

This was very upsetting to me. Can we take a break?

Q. Sure.

(Short break taken)

BY MS. MASINTER:

Q. At the meeting that you had, was this the first time you had really learned about the consequences of being a nine with regard to getting an Action Plan or getting a package?

A. I believe there was talk of a severance package being offered to these people, and I'm sure that there was talk about an Action Plan too.

Q. Was it official talk, or was it talk aroung the plant?

(44)

A. I can't remember that that was said at the meeting. Whether Dave said that or not, I really don't remember. But

there was definitely talk at the plant that that was going to be the course of action.

I would like to correct something that I said.

Q. Sure.

A. I said at the meeting I was given an Action Plan. I wasn't given an Action Plan. I was given my package.

Q. But he discussed the possibility of an Action Plan with you?

A. Yes. He said an Action Plan would be written for me.

Q. What did he tell you an Action Plan was, or did you have an understanding of what an Action Plan was?

A. He didn't go into any detail, and I didn't ask. He said that I would be evaluated probably either on a monthly or every two-month basis. He said that probably at that time I would be terminated. And I said, "You mean, I would be fired?"

And he said, "Yes."

(48)

actual documents. Do you recall what they handed you?

A. It was a letter, I think, from H.R. stating that I would get one month administrative leave and one month — and one week for every year of service.

Q. Was there anything else contained in — attached to the letter?_

A. I don't remember.

Q. I'm going to show you a letter that is dated January 16, 1995. And it's signed by Richard Farizo.

A. Uh-huh (affirmative).

MS. MASINTER:

Would you please mark this as Oubre Exhibit 1. We're going to mark this instead of Oubre Exhibit 1 Defendant's Exhibit 1.

BY MS. MASINTER:

Q. Would you take a look at this letter and tell me if this is the letter you received, a copy of a letter you received on January 17 in your meeting with Dave and Jim (tenders)?

(49)

A. I believe so.

Q. If you look on page 2, the second paragraph talks about a release. Were you provided with a release at that meeting.

A. Yes.

MS. MASINTER:

Would you mark this as Defendant's Exhibit 2,

please.

BY MS. MASINTER:

Q. I'm going to hand you a copy of a document. It's marked "Release" at the top, and it appears to have your name filled in at the top, and it appears to be signed by you on January 31, 1995. Would you take a look at at that and tell me if that appears to be a copy of the release you received (tenders)?

A. Yes.

Q. Do you recall whether you actually signed a release?

A. Yes.

Q. Does that appear to be a copy of your signature?

a. Yes.

Q. Other than this letter that is marked as Defendant's 1 and the release that

(50)

is marked as Defendant's 2, did you receive any other documents in connection with the package?

A. I don't believe.

Q. I'm going to show you a document that I'm not going to mark as an Exhibit. Actually, three documents, which appear to kind of calculate out the amount that you are

entitled to under the package of severance. Do you know if any of these documents were attached to your letter (tenders)?

A. This one was (indicating).

MS. MASINTER:

Would you mark this document as Defendant's Exhibit 3, please.

BY MS. MASINTER:

Q. I'm going to give you what has been marked as Defendant' Exhibit 3, and this appears to be a severance — it's titled a "Severance Work Sheet." And at the bottom it says total severance is $6258.62. And you recall this document being attached to the letter?

A. Yes.

Q. Did you and Jim and Dave discuss

(52) _

other girls. That's the only thing he said.

Q. So other than hearing that your computer skills were not up to par, you don't have any understanding of what factored into your performance or potential rank?

A. No.

Q. When did you first sit down and read the whole contents of your severance package?

A. Probably that night when I got home. During the whole meeting, Jim held the severance package. I never — when the meeting ended, he put it — he opened — I mean, he put everything back into the folder and handed it to me. But during the meeting, I never had access to the package at all.

Q. How did your meeting with Jim and Dave end? Was it your understanding that you had time off to consider —

A. Jim — I mean, Dave told me, "Take a few days to make your decision, and let me know."

Q. Did he force you to take a few days or —

A. Oh, no. This was — I mean, he
(53)
could see that I was upseet. So I took it for granted that he was doing this as a nice gesture.

Q. You never felt like he was penalizing you?

A. Oh, no, never.

Q. After you got home and took a look at the package, did you discuss it with anyone?

A. I had a friend come over that night because I was so upset and discussed it.

Q. Who was that?

A. James Bruce. I don't know that at that time we

discussed the package. I think I was just distraught, and he came over for support.

Q. What was your understanding of when you had to make a decision regarding whether you would take a package?

A. January 31st.

Q. So that would have been —

A. Two weeks.

Q. Two weeks?

A. (Witness nods head affirmatively.)

Q. When you got home, did you read
(54)
the letter and the release?

A. I'm sure I did.

Q. Did you understand the contents of the letter?

A. No.

Q. What didn't you understand about the letter?

A. I didn't understand anything about releases period.

Q. No, I'm not asking about the release. I'm just asking about the letter.

A. Oh, this letter, you mean (indicating)?

Q. Right.

A. Did I understand it?

Q. Did you understand that it was offering you a severance package?

A. Yes. Yes.

Q. Did you read it, the letter, thoroughly?

A. I'm sure at one point I read the letter thoroughly To tell you I did it that paraticular night —

Q. At one point, did you read it thoroughly?

(55)

A. Yes. Yes.

Q. Did you read it more than once?

A. Of course.

Q. Was there anything in the letter that you had questions about?

A. There were, yes. I called Mike — yeah, Mike Brock.

Q. Who is Mike Brock?

A. He was H.R. I had questions concerning benefits.

I had questions concerning savings plan, a few — I don't remember offhand, but I did talk to Mike Brock to get some —

Q. Did he answer your questions?

A. Yes — to get some clarification.

Q. Did you understand from reading the letter that in order to take the severance plan you would have to sign a release?

A. Yes.

Q. Let's talk about the release. Did you actually sit down and read the release —

A. Yes.

Q. — when you received it? Did you have any questions about the release?

A. Yes.

(56)

Q. What questions did you have?

A. Well, I didn't know anything about releases, you know, and I didn't know — I didnt know if the information on here was correct. I didn't understand what the information was. I mean, you know, I just — this was something totally new to me, and I had absolutely no knowledge of releases. I had multiple questions.

Q. Did you subsequently come to some understanding of the effect of a release?

A. Yes.

Q. When was that?

A. After I sought legal advice.

Q. When was that?

A. Oh, God. Let me see. About a week after the meeting.

Q. So —

A. About January — let's just say the 24th. About a week after.

Q. So around January 24th, you sought legal advice to discuss the release?

A. Yes.

Q. At that point you came to some sort of understanding —

(58)

So on january 31, 1995, you notified Mr. Rooney that you were going to accept the package; is that correct?

A. I called Jim, and I told him that I had questions concerning the first meeting between he and Dave and I and could he please come — would he agree to meet with me before

I gave him a decision. He said, yes.

Q. When did you go and meet with him?

A. That day.

Q. What happened at that meeting?

A. I wanted to make sure that I clearly understood what was being told to me during that first meeting; so I — well, first, I started the meeting by asking Jim to explain — I said the Get Well Program, which I meant the Action Plan. And Jim got off on a tangent trying to explain the Get Well Program to me.

The Get Well Program was a program used before the Action Plan. And he went on to explain that, and then I said, "Jim, I really meant to say the Action Plan." So then he went on to — not really explain but to say once again that an Action Plan would be

(59)

written, still not telling me that I would have any input on this program for me, that — he once again reiterated that in a month or two months I would be reevaluated on how I was progressing, rated against the employees in my department, 1 through 18.

I said to Jim at that time, "Jim I have worked for you for too long" — let me explain something to you. Jim was more than a boss to me. Jim was my friend. And I believed Jim. When Jim said something to me, his word I honored. I believed him.

I said, "I worked for you too long, and we've been friends for too long for you to sit here and lie to me. I need you to be honest with me and tell me what my chances are on this program.

Jim said, "Do, your chances are not good at all," he said, because you're staying in the same position." He even went on to say, "If you were moving to another spot on site, your chances would be much better." That wasn't an option. Moving to another site wasn't an option.

So he said, "If I'm to be honest with

(60)

you, your chances are not good."

I said, "Jim, in the first meeting, it was said to me that after my first evaluation, which would be a month or two months, I would probably be terminated."

He kind of reneged on that, and he said, "Well I can't exactly say it would be a month or two months, but your chances of making a year would not be good." And he went on to say again that it was because I would be rated with the employees doing their same jobs, and I would be trying to work on a very difficult Action Plan.

He stressed that the Action Plan would be very difficult and that — so then I said to Dave — to Jim, I said, "Well, Dave said in the last meeting that my chances of moving from a nine to another category were little or nothing." And I said, "How do you feel about that?" And he said it would be very difficult to move into another category

based on the same reasons that he had given me before.

Q. Did you feel that Jim was being honest with you when he was having this conversation?

(61)

A. Yes.

Q. What happened next at the meeting?

A. We discussed — I believe that's all. And then I said I was ready to sign the release.

Q. And just you and Jim were at the meeting?

A. This was Jim and I at that meeting, yeah. Like I said, I just wanted him to — I just wanted to hear the same things that I had heard in the first meeting to make sure that I understood exactly what was being told to me again.

Q. And you signed the release in the presence of Mr. Rooney?

A. Yes.

Q. Did you watch him sign the release as a witness; do you know? It appears to be his signature down here as a witness.

A. Yes, that's his signature.

Q. Did you watch him sign it?

A. I guess I did, but I don't remember at this point. We were the only two in the room.

Q. Who was the attorney you spoke to

(63)

A. He's in Vacherie, Louisiana. And the second attorney was Bernadette Lee.

Q. Where is she?

A. Poydras.

Q. That name sounds familiar. Okay. Did Entergy pay you in accordance with the severance plan that you had elected to take?

A. Yes.

Q. Did they pay all moneys that they owed you under that?

A. Yes.

Q. Do you know when your — you began receiving money?

A. February.

Q. Do you know when you received your last check?

A. June 6th.

Q. That would be 1995?

A. Yes.

Q. At any point have you even attempted to return any of the money you received pursuant to the severance plan to Entergy?

A. I was not aware that I had to return any moneys to Entergy. No, I did not

(64)

return any moneys to Entergy.

Q. Did you ever attempt to return any money and was refused?

A. No.

Q. I'm going to ask the court reporter to mark the complaint that you filed in this lawsuit as Defendant's 4.

I'm going to show you a copy of your complaint that was filed by your attorney, Ms. Haynie, not your other attorneys, in this lawsuit. And I just want to ask you some questions about it.

Actually, before we talk about the complaint, I want to ask you one other thing. You filed a charge of discrimination with the EEOC, didn't you?

A. Yes.

Q. At any time did you discuss with the EEOC the release?

A. I don't believe.

Q. Let's go back to the complaint. In your complaint, you allege basically that you were constructively discharged, or you felt like you had no option other than to quit your job, and you allege that you believe that

(80)

just devastated, and I couldn't handle it.

Q. Did you quit Ochsner?

A. Yes.

Q. Do you recall what your income was on your 1994 income tax return?

A. '94?

Q. Yes. Wait. When did you sign this? '95. I'm confused. My years are confused. Your 1995 income tax return.

MS. HAYNIE:

The one you just filed.

THE WITNESS:

Yes. I don't remember. Twenty-one, maybe. I don't remember. I recall '94.

BY MS. MASINTER:

Q. Don't worry about '94. Did you receive unemployment compensation?

A. No.

Q. When did you decide to sue Entergy?

A. When?

Q. Yes.

A. Right after.

Q. Right after?

(81)

A. (Witness nods head affirmatively.) I guess when I sought legal advice.

Q. From the first two lawyers?

A. Yes.

Q. When did you find Ms. Haynie?

A. August of last year, I think.

Q. How did you find her?

A. Through another attorney.

Q. Did you give her a copy of your release?

A. I believe so.

(Short break taken.)

BY MS. MASINTER:

Q. Could you just run down for me where you have received income for the year 1995, where you have worked during 1995 since you left Entergy?

A. Ochsner for three weeks and Browne-McHardy Clinic for four months maybe, and that's it.

Q. How much were you making at Browne-McHardy Clinic?

A. Seven.

Q. The attorney that referred you to

(88)

expertise on than any of the — the rest of the girls in the office.

Q. And the reason she had that expertise is because she was working with it more so than the others?

A. She had been tasked with it, right. Exactly.

Q. Let's look at the exhibits that are going to be attached to your deposition. Exhibit No. 1 is a letter dated January 16, 1995. In the first sentence of that letter, it indicate, "A Ranking Voluntary Severance Option has been approved and is now being offered to you." Do you believe

that the severance option was voluntary?

A. I don't believe that I had an option.

Q. Why do you feel you didn't have an option?

A. Because of what was told to me by Dave and Jim in our meetings.

Q. On page 2, in the second paragraph, the last sentence of that paragraph states, "If you do not elect the Voluntary Severance, an Action Plan will be developed

(89)

and you will be given the opportunity to improve your Ranking." Was that your understanding with regard to the Action Plan and how it would work?

A. No. It's quite contradictory, because they told me there was very little chance of improving that ranking, if any at all.

Q. How long were you given to contemplate whether you were going to take the severance package or stay with the company?

A. The meeting — the first meeting was on January 17th, and I was told I had to give a decision by the 31st.

Q. So two weeks?

A. Yes.

Q. Was that a big decision for you to make in a two-week time period?

A. Of course.

Q. Why? Why was it in your particular case?

A. Because I'm single. I'm sole supporter of myself. I knew that I was never going to go out into the work force and find a job making the money that I was making there.
(90)
I knew that I would have to start over from the bottom again. It was devastating to me. I was worried about medical benefits because I had a medical problem.

Q. Were you surprised to find out that you were ranked a nine?

A. Yes.

Q. Why did that come as a surprise to you?

A. Because of statements that had been told to me, statements in a meeting that we had — not "we" but in a meeting that Dave had with Stacy one day at her desk to explain — Stacy asked Dave to explain the ranking process to her, which I was not privy to. This was told to me. That she wanted to understand how it would work.

And so Dave drew the three tiers on the board; one, two, three, four, five, six, seven, eight, nine. He explained to her how everybody would be ranked in performance and

potential. And at that time Stacy stated that Dave told her that the assistant schedulers would fall in the five and six category because of our potential, our high potential,
(92)

A. No.

Q. How were you paid?

A. Regular salary, regular two-week salary.

Q. So you received a check every two weeks?

A. Yes.

Q. And I believe you indicated that this provided you with approximately 3 1/2or four months worth of salary?

A. Yes.

Q. What did you do with that money?

A. That was my living expenses.

Q. You paid your bills?

A. Sure.

Q. Of any of that money, could you put any of it into savings?

A. No.

Q. Now, you heard Ms. Masinter allude to paying back any money to the company. Do you have any understanding of what she was talking about with regard to tendering back any money to the company?

A. No.

Q. If you were to learn that for the
(93)
release that you were told by your previous attorney that it was invalid — that you had ratified it by keeping the money that you were given from the severance package and to undo that you would have to tender back money to the company, would you tender back money to the company to pursue a lawsuit?

A- You mean, I would have to give back the $6,258?

Q. Right, if those were the circumstances.

A. I have $6258. I would have to think long and hard on that, because the salary that I'm working with now is basically half of the salary that I was working with when I left Entergy. What is in my savings — I don't bring home enough money to pay all of my bills. I have to take money from my savings every month just to meet everything that I need. And that would be a very hard decision. I would have to think really hard. I would have to weigh the consequences.

Q. At any time during the discussion with Mr. Shipman or Mr. Rooney regarding your option in the Action Plan or the severance

APPENDIX H

RELEASE

I, Dolores M. Dubre, knowingly, voluntarily, and for
(Employee name)
valuable consideration agree to waive, settle, release, and discharge any and all claims, demands, damages, actions, or causes of action occuring on or before the date of the execution of this Release, whether known or hereafter discovered, that I may have against Entergy Operations Inc., its parent corporation, subsidiaries, affiliates, officers, directors, employees, agents, and legal representatives and their respective successors, heirs, and assigns ("the Company"), which in any way relate to my employment by or my separation from the Company.

I acknowledge that I was provided with a copy of this Release, that I was advised to discuss this Release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claims covered by this Release, I am waiving potentially valuable rights by signing below. My execution of this Release is free and voluntary and was not procured through duress, coercion, or undue influence.

I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT BE OTHERWISE ENTITLED. I UNDERSTAND,

ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT.

This 31 day of Jan., 1995.

WITNESS:

/s/ James P. Rooney, Jr.

By: /s/ D M Oubre

Dolores M. Oubre

EXHIBIT D to it's Opposition to A's Motion for Summary Judgment filed into the District Court Proceedings.

CORRECTED COPY

(8)

NO. 96-1291

In the
Supreme Court of the United States

OCTOBER TERM, 1996

DOLORES M. OUBRE,
Petitioner

versus

ENTERGY OPERATIONS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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59 pp

QUESTION PRESENTED

1. Whether petitioner ratified an otherwise invalid waiver by retaining consideration paid in exchange for the waiver and/or in failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the waiver binding?

PARTIES TO THE PROCEEDINGS

Petitioner, Dolores M. Oubre, is a former employee of Entergy Operations, Inc., respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DOLORES M. OUBRE,
Petitioner

versus

ENTERGY OPERATIONS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals rendered November 6, 1996 is reported at 112 F.3d 787. The opinion of the United States District Court for the Eastern District of Louisiana rendered May 20, 1996 is unreported.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was rendered November 6, 1996. The Petition for Writ of

Certiorari was filed on February 4, 1997 and granted April 21, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 and 2101 (c).

STATUTORY PROVISIONS

AGE DISCRIMINATION IN EMPLOYMENT ACT

SECTION 201. WAIVER OF RIGHTS OR CLAIMS

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f)(1) An individual may not waive any right of claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

"(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual elegible to participate;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period had expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(G) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum–

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G) or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may effect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

STATEMENT OF THE CASE

(i) Course of the Proceedings

On September 26, 1995, petitioner, Dolores Oubre, a former employee of Entergy Operations, Inc. ("EOI") and an individual over the age of 40 at the time of her separation of employment, filed suit in United States District Court, Eastern District for the State of Louisiana. The Complaint was brought pursuant to Title 29 U.S.C. § 621, et seq, the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended in 1978, 1990, and 1991, and Louisiana Revised Statute Article 23:972 and 51:2231 et seq. Ms. Oubre has alleged that she was constructively discharged from her job because of her age.

Following limited discovery, Entergy Operations, Inc. filed a Motion for Summary Judgment on May 2, 1996. Respondent argued that the claimant waived her rights to bring a civil suit when she signed a waiver at the time of her separation of employment. Respondent further argued that Oubre ratified the waiver, which did not comply with the statutory requirements of the ADEA, by failing to return the benefits she received pursuant to the terms of her separation of employment.

The lower court entered Judgment in favor of the defendant's Motion for Summary Judgment on May 23, 1996.(Joint Appendix A-17) The Court ruled that it was not at liberty to disregard the jurisprudence of the Fifth Circuit Court of Appeals which portends that an invalid waiver under the ADEA is merely voidable and not void and that the claimant, who retains funds received upon separation of employment

and does not tender back said sums, acts to ratify the voidable waiver making it binding.

Notice of Appeal from final Judgment rendered on May 23, 1996 was timely filed by the claimant on June 19, 1996. Judgment was rendered by the Fifth Circuit of Appeals on November 6, 1996 affirming, without reason, the lower court ruling which granted respondent's Motion for Summary Judgment. (Joint Appendix A-22) Petitioner timely sought review of the lower court's decisions in this Court by Writ of Certiorari which was granted April 21, 1997.

ii. Material Facts

Dolores Oubre, a single female was employed as an Assistant Scheduler in the Planning and Scheduling Department at Waterford Steam Electric Generating Station ("Waterford III") in 1994. She had been employed at Waterford III as an EOI employee for approximately seven years. (Joint Appendix A-28,29)

In the fall of 1994, EOI implemented a new employee evaluation process called the Management Planning and Review Ranking Process (The "Ranking Process").(Joint Appendix A-37,38) The Ranking Process was allegedly developed to evaluate management and professional (salaried) employees at EOI by ranking them by two criteria, "performance" and "potential", as compared to their peers. Those rankings where then transfered to a matrix that placed employees in one of 9 groups.(Joint Appendix A-58,59)

It was mandated that 10% of the targeted population be ranked in category 9 or the lowest ranked group.(Joint Appendix A-37) People receiving two consecutive annual ratings in group 9 (fall 1994 and fall 1995) were to be terminated from EOI. Termination, however, could occur anytime for any employee ranked 9 within the 12-month period proceeding the next annual evaluation. Severance was not to be paid to individuals *terminated* from group 9. Those ranked in group 9 were to be given individual action plans with the understanding that even if the individual met all goals, there was no guarantee that the individual would move out of group 9 and thus, would be subject to termination without benefits.(Joint Appendix A-49,50,51)

Pursuant to the ranking process, Oubre was ranked against all other salaried, non-managerial employees in the Planning and Scheduling Department. She ultimately fell into the group 9 category, although she had been awarded the highest evaluation level compared to her peers for the preceding two years. In 1992, Oubre received a promotion from Computer Operator I to Computer Operator II, an indication that she was promotable, which was a criteria for evaluation under the "potential" prong of the two pronged 1994 rating process.(Joint Appendix A-34) Further, the plaintiff had completed *all* of her goals established by her immediate Supervisor for 1994, a criteria to be used when evaluating an employee's annual performance, the second prong of the 1994 rating process. Thus, Oubre had no forewarning that she would fall within the 9 ranking and be faced with termination.

On January 17, 1995, Oubre was notified of her 9 ranking and the consequences thereof, i.e., that if she were ranked a 9 in next year's evaluation she would be terminated without the benefit of any severance pay, that an action plan would be developed for her (though one was not available

for her review) and if she did not continue to meet the goals and objectives of the action plan, she would be terminated at anytime.(Joint Appendix A-38,39,40) She was also told that even if she met all the goals, it would be very difficult to move out of the 9 ranking, thus resulting in termination. Once informed of the precarious and vulnerable status in which she found herself as an employee ranked 9, Oubre was then presented with a severance package that included a general waiver.(Joint Appendix A-41)

The petitioner was given only two weeks to contemplate and to comprehend the abrupt change in her employment status which was based upon an evaluation that was dramatically inconsistent with her previous performance.(Joint Appendix A-44) She also had to determine the availability of employment opportunities; determine if they would afford her enough income to meet her monthly financial obligations; assess her employability based upon having been labeled one of the lowest rated employees; and evaluate the risk in maintaining employment with EOI by selecting the action plan (which had not yet been drafted and which would subject her to potential termination within one to two months without any benefits) or accept the severance package. On January 31, 1995, after a second meeting with her immediate Supervisor, Jim Rooney, to clarify that it would be virtually impossible for her to move out of a 9 ranking, Oubre accepted the severance package, signed the waiver and was paid by EOI in accordance with the payment outlined in the severance package.(Joint Appendix A-49,50,51)

Given the circumstances surrounding the offer of the severance package, i.e., unexpected placement into the lowest ranked group of employees at Waterford III in contrast to her previous outstanding work performance and promotability potential, the insufficient time within which to review

the two options presented, the lack of information provided regarding other employees similarly situated, and the threat of termination if she opted to remain at EOI, the petitioner felt compelled to accept the severance and in return executed the waiver of rights.

SUMMARY OF THE ARGUMENT

The statutory language of the Older Workers Benefit Protection Act ("OWBPA") found at Secton 7 of the Age Discrimination in Employment Act ("ADEA") of 1967 (29 U.S.C. § 626, et seq) does not support the District Court's and Fifth Circuit Court of Appeals' application of the common law doctrine of ratification of an otherwise invalid waiver of rights by an employee who retains consideration paid pursuant to the terms of the waiver. The OWBPA states plainly that an older worker **may not** waive his rights under the ADEA unless the waiver is knowing and voluntary. To assure that a waiver is executed by an employee knowingly and voluntarily, Congress articulated numerous criteria which, at a minimum, must be contained in a waiver of rights. If the waiver is deficient in these requirements, then it is not enforceable by the employer against the employee who executed the waiver. Even if the waiver contains the specific provisions set forth in the OWBPA, an employee may still prove he did not knowingly and voluntarily executed the waiver in challenging its enforceability.

In enacting the OWBPA, Congress clearly abrogated the common law doctrine of ratification. The enforceability of a waiver is to be determined by the waiver's compliance with the requirements of the OWBPA and ultimately by the action of the employee in executing a waiver of rights as

knowing and voluntary at the time the waiver is executed. The actions of the parties following the execution of an invalid waiver is of no moment in light of the language of the OWBPA, the Congressional intent in enacting the OWBPA and in promoting the express purposes of the Act in protecting the rights of older workers. There is no support for the utilization of the common law doctrine of ratification in either the language of the statute or in the promulgation of the provisions of the act in promoting the protection of older workers. Quite to the contrary, application of the doctrine of ratification of an invalid waiver would nullify those protective measures specifically codified by Congress in the OWBPA.

While these same arguments also support rejection of the common law doctrine of tender-back as a condition precedent to suit, further countenance is found in the judicial precedence of this Court. This Court has previously rejected a tender-back requirement where such a requirement would override the protection provided by the Federal Employees Liability Act ("FELA"). 45 U.S.C. § 51, et seq.; *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968). There is no principle distinction between FELA and the OWBPA in that both statutes are intended to protect the rights of employees in relation to their employers who traditionally maintain a position of superiority. As a remedial statute, much like FELA, the OWBPA promotes the recovery for older workers injured by age discrimination and acts as a deterrent to employers from engaging in discriminatory behavior.

Enforcement of a tender-back requirement where a waiver is defective would eviscerate the act and neutralize any deterrent quality Congress intended the act to promote.

This outcome is clearly evident in the case at bar. The respondent has been afforded judicial validation of its unlawful acts in violating the OWBPA by the lower courts and escapes consequence of its unlawful acts because the petitioner can ill afford to tender-back the consideration at issue which was expended while seeking further employment.

Finally from a position of equity, the employee is placed at a severe disadvantage if forced to make choices regarding her future with little or no information from the employer and inadequate time to consider the options presented by the employer in contemplating termination of the employment relationship. Employers are clearly in a better position to protect their interests than is an older worker. The OWBPA equalizes this inherent disparity by requiring that the employee when faced with termination of the employment relationship make a knowing and voluntary choice to waive Federally protected rights of protection against age discrimination.

This court should reject both the theory of ratification and tender-back as espoused by the District Court and Fifth Circuit and rule that the invalid release presented by the respondent is unenforceable against Ms. Oubre, allowing her to proceed with her claim of age discrimination.

ARGUMENT

I. THE PLAIN READING OF THE OWBPA IS IN DIRECT CONFLICT WITH THE COMMON LAW CONTRACT DOCTRINE OF RATIFICATION

The initial question to be addressed by the Court is whether an employer's failure to conform to the waiver requirements enumerated in Section 7 of the Age Discrimination in Employment Act ("ADEA") of 1967 (29 U.S.C. § 626 et seq.), recognized in the legislative nomenclature as the Older Workers Benefit Protection Act ("OWBPA"), renders the waiver unenforceable. The statutory language of OWBPA makes it clear that an older worker may not waive the rights afforded him under the ADEA unless the worker knowingly and voluntarily waives these rights. In order for a waiver to be valid, Congress enumerated criteria which, at a minimum, must be satisfied to effect a knowing and voluntary waiver. If this criteria is not met, then this waiver is not made knowingly and voluntarily, and the rights afforded to the older worker under the ADEA remain enforceable. Based on the clear statutory language and the legislative purpose of the Act, the common law doctrine of ratification has no application to the enforceability of a waiver which violates the OWBPA.

A. *OWBPA and its Mandatory Provisions*

The Age Discrimination in Employment Act of 1967 prohibits discrimination in public and private employment against individuals who are at least forty years of age.

29 U.S.C. §§ 621-34. The ADEA is a hybrid of Title VII and the Fair Labor Standards Act ("FLSA"), 42 U.S.C. § 2000e and 29 U.S.C. §§ 201-19, in that the language enforcing nondiscrimination generally mirrors the language of Title VII, while the ADEA's remedies generally follow those of the FLSA.

Legislation introduced in the Senate as S. 1511, and later signed into law as OWBPA, [1] provided for the first time, by statute, that a waiver not supervised by the Equal Employment Opportunity Commission ("EEOC") may be valid and enforceable if it meets certain threshold requirements and is otherwise shown to be knowing and voluntary.[2] This was a distinct departure from prior practice and the prohibitive provisions of the FLSA and, as such, Congress intended that the "requirements of the Act be strictly interpreted to protect those individuals covered by the Act." Senate Committee Labor and Human Resource, The Older Workers Benefit Protection Act, S. Rep. No. 263 at 31, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.W. at 1509, 1537.

Congress, faced with the rising tide of reductions in force brought about by mergers, increased competition, and general corporate profitability concerns, ensured that older

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[1] The waiver issue addressed in S. 1511 was a relatively diminutive portion of the overall Act, which was enacted primarily to overturn *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, (1989) (the Supreme Court ruled for the first time that the ADEA did not prohibit employers from discriminating in employee benefits).

[2] In 1978, Congress transferred authority for administering and enforcing ADEA from the Secretary of Labor to the EEOC. That transfer of authority did not alter the procedural provisions of the ADEA, but it did for the first time authorize the EEOC to promulgate rules interpreting the Act. The EEOC alleged that it lacked the resources to continue the practice of supervised waivers.

workers would not be coerced or manipulated into waiving their rights to seek legal relief under the ADEA. The House and Senate hearings on the OWBPA revealed a disturbing picture of waiver practices by employers coercing early retirees or employees into participating in exit incentive or other group termination programs and effectively forcing these older workers to waive their rights when the employer conditioned such participation on the signing of a waiver.

The facts surrounding Ms. Oubre's termination of her employment relationship with EOI is a typical example of abuse of waivers by employers which piqued Congress' concern in enacting the OWBPA. Ms. Oubre was included in a group termination program, 10% of salaried plant personnel ranked 9, who were confronted with the undesirable choice of staying with EOI and face eminent termination without benefits or accept a diminutive severance consideration in exchange for a waiver of rights. Faced with this option, Ms. Oubre, a single woman without benefit of supplemental financial support, felt she had no option but to accept the consideration and execute the waiver.(Joint Appendix A-57,58)

Congress' purpose in enacting OWBPA was two-fold: (1) to "make [ ] clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful," (referencing Congressional intent to override *Betts*) and (2) to "ensure [ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA" (referencing waiver requirements) while removing the EEOC's chief concern regarding the agency's capability to supervise. S. Rep. No. 263, 101st Cong., 2d Sess. 2 (1990).

The restrictive introductory language of the Act sets the tone for the very limited circumstances in which an employee may waive rights provided under the ADEA. The Act reads that "an individual ***may not*** waive any right or claims arising under the Act, unless the waiver is knowing and voluntary." 29 U.S.C.§ 626 (f) (1) (emphasis added) A waiver document *may not* be considered as being executed knowingly and voluntarily by the employee unless it meets, *at a minimum*, the following criteria:[3]

(A) the waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) it must specifically refer to rights or claims arising under the Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual does not waive rights or claims in exchange for consideration in addition to anything of value to which the individual is already entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

[3] When a settlement is reached pursuant to a charge filed with the EEOC, under that body's supervision, or pursuant to an action filed in court only criteria (A)-(E) need be met with the additional requirement that an individual be given a reasonable period of time to consider the settlement. 29 U.S.C. § 626 (f) (2).

(F) (i) the individual is given 21 days within which to consider the agreement; or

(ii) if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given 45 days within which to consider the agreement;

(G) the agreement provides that for a period of seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the expiration of the revocation period; and

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. *Id.*

Congress, recognizing that some of the criteria specifically enumerated in the Act was already deemed indicative of

whether a waiver is knowing and voluntary to an individual, expressed its intent that *each* criteria must be met in order to have a valid waiver of rights. "[E]ach requirement set forth in the bill must be satisfied independent of the 'knowing and voluntary' factor for any waiver to be *lawful.*" H.R. Report 101-664 @ 51, 101st Cong. 2d Sess. (1990) (emphasis added)

The Act states that subpoints (a)-(h) are merely minimum requirements for a valid waiver, compliance with which is not a safe harbor for employers. The OWBPA was enacted to "establish a floor, not a ceiling." *Soliman v. Digital Equipment,* 869 F.Supp. 65, 68 n.12 (D.Mass. 1994) The language of the Act encompasses the possibility that all of the conditions could be met in a waiver and still, for other reasons not articulated in the Act, the waiver could be held not knowing and voluntary. One example of this situation would be if the employer lied to the employees or fraudulently concealed material facts. Thus, even if all provisions of OWBPA were complied with, the waiver could still be invalid if the employee can establish that the waiver was not knowing and voluntary.

The thrust of the Congressional intent of the OWBPA provisions, which set in place safeguards whenever waivers are utilized, rested upon the premise that employers should not pressure individuals into signing a waiver of legal rights, either by lack of time to adequately consider the terms and conditions of the offer, or through an insufficient explanation of the offer or the circumstances leading to the offer. Aging Comm. Pub. No. 722, Education and Labor Comm. Pub. No. 31, 101st Cong., 1st Sess. (1989); S. Rep. No. 263, 101st Cong., 2d Sess. (1990). The provisions enumerated in the Act, when enforced, provide the employee with the necessary time and information to make a knowledgeable decision regarding the offer extended by the employer. *Long v. Sears, Roebuck*

& *Co.*, 105 F. 3d 1529 (3rd Cir. 1997); *Raczak v. Ameritech*, 103 F.3d 1257 (6th Cir. 1996); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993). Through the provisions of the OWBPA, Congress limited and regulated the use of waivers in the context of an ADEA claim thus negating application of the common law doctrine of ratification.

As argued by the Court in *Long*, Congress explicitly intended to provide protective measures for employees beyond those found in common law. *Long*, 105 F.3d 1529 The court listed, among other examples, "[t]he right to seek counsel, the 45-day consideration period, the seven day right of revocation and the provision of detailed information about those affected by group terminations" as protections not afforded under the knowing and voluntary standard of common law. *Id.* at 1539. Each enumerated provision of the Act affords an older worker a safeguard which hinders or prevents an employer from intimidating employees into waiving their claims without sufficient time or information to consider the consequences of their actions. Only when all the requirements enumerated within the OWBPA are satisfied, is the rebuttable presumption of knowing and voluntary created.

This initial presumption is not met in the present case, as conceded by EOI, in part because Ms. Oubre was given woefully inadequate time to consider her options as presented by the employer and given no information regarding others affected by the forced ranking.(Joint Appendix A-61,62) Armed with time and knowledge, Ms. Oubre, or her representative, would have had the opportunity to detect an age bias in the ranking process and use the leverage of litigation to bargain for a more equitable exchange of consideration for her waiver of rights.The OWBPA, thus, creates a level playing field for the older worker with his employer when a valid waiver is utilized.

Congress was motivated to enact the OWBPA not only by the concern that older workers, solely because of their vulnerable status, were disadvantaged in negotiating with employers and thus, in need of protective guidelines pursuant to a waiver of rights, but also by the desire to alter the direction of newly authorized EEOC regulatory policy and subsequent jurisprudence.

In 1985 the EEOC issued a proposed rule permitting waivers under the ADEA without government supervision.[4] In light of the EEOC action, the Sixth Circuit, sitting *en banc*, reversed itself in *Runyan v. National Cash Register Corp.*, [5] ruling for the first time that a plaintiff could waive rights under the ADEA pursuant to a bona fide factual dispute-contrary to a legal dispute as address in *Lorillard* and in *Shulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925 (1964) (ruling that FSLA precludes bona fide settlement of dispute over coverage of overtime compensation and liquidated damages). 787 F.2d 1039 (6th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 850 (1986) While the court ruled that under particular circumstances employers and employees may negotiate a valid waiver of ADEA claims, it strongly cautioned courts not to allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching. *Id.* at 1044-45.

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[4] In 1978, Congress transferred authority for administering and enforcing ADEA from the Secretary of Labor to the EEOC. That transfer of authority did not alter the substantive or procedural provisions of the ADEA, but it did for the first time authorize the EEOC to promulgate rules interpreting the Act. The EEOC alleged that it lacked the resources of capability to supervise waivers.

[5] 759 F. 2d 1253 (6th Cir. 1985) (ruling that an individual could not waive his rights under the ADEA pursuant to FLSA's ban on unsupervised releases.)

Immediately following the issuance of the EEOC final rule in August 1987, allowing private waivers under the ADEA, and in light of the growing body of jurisprudence regarding ADEA waivers, Congress, suspended the rule for one year to examine the legal foundation of the rule and public policy impact. 133 Cong. Rec. S 14383-84 (Oct. 15, 1987) The primary concerns raised by Congress focused on termination programs, the terms of which effectively forced an employee to waive his rights to file a claim when the employer conditioned participation in the program on the signing of such a waiver. The possibility existed, under such termination plans, for a preemptive waiver of rights to occur before a dispute had arisen and before an employee may even be aware of any potential or actual pattern of discrimination.[6] In support of suspending the EEOC's rule, Senator Melcher, Chairman of the Special Committee on Aging, expressed the policy concerns of Congress:

> "This is important because of the inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but will also forfeit any present or future benefits to which they may otherwise be entitled." 133 Cong. Rec. S14383 (October 15, 1987)

Following hearings in both the House and Senate the

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[6] "In this non-dispute context, where employees have no reason to be on guard to protect their rights, it is simply bad public policy to allow waivers...[s]uch a result is wholly at odds with the purpose of ADEA." S. Hrg. No. 24, 101st Cong. (March 16, 1989) (Senator Metzenbaum, Chairman, Subcommittee on Labor, at 5)

suspension of the EEOC rule was extended an additional year.[7]

Although Congress acted decisively to prohibit the EEOC rule from taking effect, a number of lower federal courts issued decisions permitting unsupervised waivers under the ADEA in certain circumstances.[8] The rationale of these decisions was criticized as encompassing numerous factors or criteria sufficient to support an enforceable waiver on a case-by-case basis. Congress expressed concern that this approach would create far more litigation in the future. For this reason Congress intended Senate sponsored legislation, S. 1511 (OWBPA), and the House equivalent H.R. 3200, Title II (ADEA waivers) to limit waivers to certain situations and then spell out clear and ascertainable standards to govern

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[7] Strong bipartisan support arose for the continued suspension with high criticism expressed for the EEOC's position. "These hearings have highlighted... the doubtful validity of the EEOC interpretation of Congress' intent when it incorporated the FLSA enforcement procedures of the ADEA." Letter from Senators Sasser, Leahy, Grassley, Mikulski, DeConcini, Weicker, Reid, Chiles and Lautenberg of June 7, 1988, reprinted at 134 Cong. Rec. S14511 (Oct. 4, 1988)

[8] Some courts relied on the EEOC rule making proceeding before the rule was suspended. *See, e.g. Runyan v. NCR Corp.*, 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 850 (1986); *EEOC v. Cosmair, Inc.* 821 F.2d 1085, 1091 (5th Cir. 1987); *but see Conventry v. United States Steel Corp.*, 856 F.2d 514, 521-22n.8 (3rd Cir. 1988) (noted Congressional suspension of EEOC rule but declined to preclude unsupervised waivers). These lower court decisions, however, generally allowed unsupervised waivers only in settlement of a factual dispute between the parties or to compromise a claim that had already been brought. *See Runyan*, supra, 787 F.2d at 1044; *EEOC v. United States Steel Corp.*, 583 F. Supp. 1357, 1362 (W.D. Pa. 1984) Further, the lower courts continued to express a concern over potential abuse of the waiver process. *See, EEOC v. United States Steel Corp.*, supra; *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1991) (holding that termination agreement requiring employee waiver in return for severance pay was evidence that the employer willfully violated ADEA).

those situations.[9]

It was further noted that these lower court decisions were inconsistent with the Supreme Court's holding in *Lorillard* that the ADEA expressly borrowed its enforcement provisions (including supervision of waivers) from the FLSA. 434 U.S. 585 (1978). As clearly stated in House Committee report, to whom consideration of the bill was referred, "[t]his approach will clarify an unsettled area of the law and *reverse a disturbing trend of litigation concerning ADEA waivers.*" H.R. Rep. No. 664, 101st Cong., 2d Sess., (1990), at 27. (emphasis added)

Thus, Congress carefully contemplated the requirements to be included in the Act to arrest concerns that older workers, who are not equally positioned to be arms length negotiators with their employers, would execute a waiver of rights knowingly and voluntarily, in the absence of government supervision, and curtail a growing number of court decisions deemed detrimental to the rights of older workers. The ADEA was established in 1967 to protect employees of at least 40 years of age from discriminatory employment practices based on age. The mere fact that the ADEA was amended by the OWBPA in 1990, is evidence that Congress intended to afford older workers with additional protection than already existed under statute, caselaw or common law doctrine when waivers are utilized by employers. Congress clearly abrogated common law contract doctrine in enacting the OWBPA.

[9] Congress in contemplating legislation, rejected the applicability of common law contract principles and broadened the more stringent "totality of the circumstances" test by requiring certain protective factors that must be present for a waiver to be knowing and voluntary. S. Rep. No. 79 101st Cong., 1st Sess. 17 (1989).

B. *Invalid Waiver not Enforceable through Ratification*

It is clear that a plain reading of the statute prohibits a waiver of ADEA rights by an employee unless the requirements of the statute are met and the employee genuinely intends to release ADEA claims and understands that his actions will accomplish this goal. The waiver section of the OWBPA decrees unconditionally that "[a]n individual may not waive any right or claim" unless (at a minimum) the statutory conditions are met. 29 U.S.C. § 626 (f) (1). Congress has (for good public policy) deprived individual employees of the power to waive their claims unless the employer first follows the law.[10]

The "strong presumption" that the plain language of the statute expresses congressional intent is rebutted only in "rare and exceptional circumstances", *Rubin v. United States,* 449 U.S. 424, 430, (1981), when a contrary legislative intent is clearly expressed. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432, n. 12, (1987); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, (1980). "[S]tatutory construction 'must begin with the language of the statute itself,' and '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive'." *Bread Political Action Committee v. FEC,* 455 U.S. 577, 580, (1982) (citations omitted). As stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984): "[F]irst, always, is the question whether

[10] A common theme is found in conventional labor law, which bars companies from entering into individual agreements with employees within a bargaining unit to prevent union busting. *See Alexander v. Gardner - Denver Co.,* 415 U.S. 36 (1974).

Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, [ ], must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-843. A reading of a statute can not be plainly contrary to the intent of Congress. *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, (1988).

The intent of Congress to prohibit a waiver of rights unless there is strict compliance with the terms of that statute is clearly articulated in the text of the statute and is further supported by the legislative history. The deliberate care with which OWBPA waiver requirements were drafted by Congress and the balancing of policies embodied in its choice of remedies argues strongly for the conclusion that the enumerated OWBPA requirements were meant to be mandatory to have any waiver of rights. This conclusion is fully confirmed by the legislative history of the waiver provisions.[11]

Thus, if a waiver does not contain the requirements enumerated under the Act, or an employee enters into an

[11] In addressing the standard of inquiry to be used in subsequently determining whether a waiver was made knowingly and voluntarily, the Senate managers of the bill left intact pre-OWBPA case law insofar as those decisions concerning the substantive determination of whether, in a given situation, a waiver has been executed knowingly and voluntarily. The Senate Committee specifically expressed support for the *totality of the circumstances* analysis utilized in *Civillo v. Arco Chemical Company*, 862 F.2d 448 (3rd Cir. 1988), and it disapproved, as did the House Committee, the approach used in *Lancaster v. Buerkle Buick Honda Company*, 808 F.2d 539 (8th Cir.), *cert. denied* 482 U.S. 928 (1987) which entailed the application of ordinary contract doctrine. *Senate Committee Labor & Human Resources*, the Older Workers Benefit Protection Act, S.Rep. No. 236, 101st. Cong., 2d Sess. 32 (1990)

agreement which alleviates the employer's obligations under ADEA without achieving the standard of knowing and voluntary, then the alleged waiver of rights is invalid and has no effect.[12] In *Oberg v. Allied Van Lines, Inc.*, the court concluded that "[N]o matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waive' forbids any waiver". 11 F.3d at 682 (7th Cir. 1993). This rationale has been adopted by a majority of the courts outside the Fourth and Fifth Circuits.[13]

[12] As a general rule unlawful contracts are not enforceable. Reinstatement, Contracts §§ 596,607. "Without an antecedent contract to ratify, there can be no ratification." *Wamsley v. Champlin Refining Co.*, 11 F.3d 534, 539 (5th Cir. 1993)

[13] *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, n.12 (3rd Cir. 1997) citing, *EEOC v. Sara Lee Corp.*, 923 F.Supp. 994 (W.D.Mich. 1995) (no ratification where waiver is deficient under the OWBPA, employer and employee cannot contract to waive ADEA provisions); *Elliott v. United Technologies Corp.*, 94 CV 01577, slip op. (D.Conn. March 24, 1995) (ratification at odds with plain language of the OWBPA); *Soliman v. Digital Equipment Corp.*, 869 F.Supp. 65 (defective release cannot be ratified; tender back will chill bringing of meritorious claims) (D.Mass. 1994); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1996) (Oberg approach better reasoned); *Carr v. Armstrong Air Conditioning*, 817 F. Supp. 54 (N.D.Ohio 1993) (plaintiff waived no rights since severance agreement violated the OWBPA; tender requirement not consistent with purposes of the ADEA); *Pierce v. Atchison, Topeka and Santa Fe Railway Co.*, 91 C. 3776, 1993 WL 18437 (N.D. Ill. Jan. 26, 1993), *aff'd in part, vacated and remanded in part*, 65 F.2d 562 (7th Cir. 1995) *appeal after remand*, 110 F.3d 431 (7th Cir. 1997) (OWBPA requirements preclude waiver by ratification); *Collins v. Outboard Marine Corp.*, 808 F.Supp. 590, 594 (N.D.Ill. 1992) (scope of defective release did not include claim under ADEA; consideration received need not be returned since it was not paid for relinquishment of ADEA claim); *Isaacs v. Caterpillar, Inc.*, 765 F.Supp. 1359 (C.D. Ill. 1991) (ratification and tender-back not applicable to release deficient under the OWBPA).

To the contrary, the Fifth Circuit Court of Appeals has created a body of law that supports the premise that non-compliance with the requirements of OWBPA by the employer, as enumerated above, renders a waiver merely voidable and thus subject to further contract law doctrine of recision and ratification on the part of the parties. *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995); *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994); and *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 342 (5th Cir. 1994) (following *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) ratification of waiver under ADEA (pre-OWBPA) by retention of benefits) The Fourth Circuit Court of Appeals has also applied common law doctrine of ratification to OWBPA waivers. *Blistein v. St. John's College*, 74 F.3d 1459, 1465-66 (1966) (following *O'Shea v. Commercial Credit Corp.*, 930 F. 2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859, 112 S.Ct. 177 (1991) applying ordinary contract principles to ADEA waiver, pre-OWBPA).

In *Wamsley*, the Fifth Circuit reasoned that neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA. 11 F.3d at 539[14] "[S]ignificant is the absence of any language in the statute and any statement in the legislative history indicating that a waiver executed in contravention of

[14] This interpretation is directly contrary to the language and purpose of the statute. "The Committee wishes to emphasize that waivers are initiated by the employer, not the employee. By implying that older workers have an inherent "right" to a waiver of fundamental civil rights confuses the issue and misinterprets the legislation. The legislation is designed to protect the older workers' rights and not take them away." H.R. Rep. No. 664, 101st Cong. 2d Sess. (1990)

OWBPA requirements is void...and cannot be ratified..." *Wamsley*, 11 F.3d at 539-40. The Fourth Circuit Court, relying on the same premise, held in *Blistein*, that, "[n]othing in OWBPA...abrogates the common law principle that an invalid agreement can be ratified by subsequent conduct." *Blistein*, 74 F.3d at 1465-66.[15]

These courts misunderstand the basic premise of the statute, which was to displace common law doctrine provisions with respect to waivers for age discrimination claims. In rejecting these common law arguments the Third Circuit Court of Appeal, noted that Congress abandoned common law principles by mandating requirements for establishment of "knowing and voluntary" waivers under OWBPA which far exceed grounds for contractual obligation avoidance. *Long v. Sears, Roebuck & Co.*, 105 F.3d at 1539.

The OWBPA carefully defines what constitutes a knowing and voluntary waiver, thus displacing the common law definition of knowing and voluntary. *See*, *F[illegible]eming v. United States Postal Service AMF*, 27 F.3d 259, 262 (7th Cir. 1994) Indeed, further evidence of Congress' intent to override pre-OWBPA jurisprudence guided by common law principles is the shift in initial burden of proof from the employee to the employer to show that a waiver was "knowing and voluntary". In *Wamsley*, the Fifth Circuit failed to take into account the fact that both the provisions of the statute and the legislative history evidences that Congress rejected and

[15] In fact it is significant to note that in the body of legislative history accumulated in the two years in which Congress contemplated the Act no reference or commentary is made championing ratification of a waiver as a bar to suit; nor does the Act itself or its numerous preceding incarnations contain a ratification clause.

usurped application of common law principles in enacting OWBPA.[16]

More importantly applying the common law principle of ratification to a defective waiver would eviscerate the force of the statute. Under the respondent's theory, and that adopted by the Court of Appeals, a waiver must comply with the terms of the statute unless and until an individual accepts the consideration offered by the employer, in other words, until the individual cashes the check. Presumably, this would apply in all circumstances for the individual will almost, or almost always, cash the check. Applying this theory would mean that the statute reads, in part, that an individual must be informed of the right to seek counsel, unless the individual accepts the consideration offered by the employer. If this theory is accepted, the statutory protection afforded by the OWBPA will be nullified.

Pursuant to the Act, enforceability of a waiver is made contingent upon the presence of the enumerated requirements contained therein. Given the specific goals of the OWBPA it is clear that Congress did not intend that the common law doctrine of ratification be applied to waivers invalid under the OWBPA. As noted by the Third Circuit, at the time the OWBPA was enacted, not a single court of appeals had held that a waiver which was not knowing and voluntary could, nonetheless, be enforced pursuant to ratification. *Long* 105 F.3d at 1540 n. 17.

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[16] The Fifth Circuit's own dicta argues that grounds to contest contractual performance, such as fraud, mistake and duress, were already available to employees faced with an ADEA waiver prior to the enactment of the OWBPA, thus, ignoring Congresses action in adding criteria for a knowing and voluntary waiver. *Wamsley,* 11 F.3d at 537 n. 8.

Further, an essential basis to understanding the purpose to the statute is the fact that Employers are, by far, in a better position to protect their own interests than are older employees. Employers do not need the ratification doctrine to assure protection under their waivers; they need only comply with the OWBPA. If an employer, who has the resources to become aware of what the Act requires, complies with the Act, the employee is hindered from pursuing litigation. If an employer fails to comply with the Act, it may find itself in the undersirable position of a defendant in litigation, but only as a result of its own actions and thus, no judicial solicitude or sympathy is warranted.

Federal common law, such as the ratification doctrine argued by the Respondent, should be resorted to only in the absence of action by Congress and when the Court is compelled to consider federal questions which cannot be answered from federal statutes alone. *United States v. Texas,* 451 U.S. 304, 305 (1993) As stated by this Court:

> "[W]hen Congress addresses a question previously governed by a decision [which] rested on federal common law the need for exercise of lawmaking by federal courts disappears. Unlike the determination of whether federal law pre-empts state law, which requires evidence of a clear and manifest congressional purpose, the determination of whether federal statutory of federal common law governs starts with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law. The question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress address the problem formerly governed by federal common law." *Id.*

Thus, in this context, the question is not whether application of the common law doctrine of contract ratification is equitable as argued by the lower courts, but whether it is intended by Congress. The presumption holds that Congress is understood to legislate against a background of common-law adjudicatory principles. *See, Briscoe v. Lahue,* 460 U.S. 325, (1983); *United States v. Turley,* 352 U.S. 407, 411, (1957). Thus, where a common-law principle is well established, as are the rules of ratification, *see, Commonwealth Mortgage Corp. v. First Nationwide Bank,* 873 F.2d 859, 865-66 (5th Cir. 1989); *Morta v. Korea Ins. Corp.,* 840 F.2d 1452 (9th Cir. 1988); *Anselmo v. Manufacturers Life Ins. Co.,* 771 F.2d 417 (8th Cir. 1985),the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident". *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, (1952).[17]

The fictional presumption created by the lower court, that Congress intended that an invalid waiver be given life by ratification, should be given consideration only upon legislative default and applying only where Congress has failed expressly or impliedly to evince any intention on the issue. This is simply not the case with OWBPA. The language and the inherent purpose of the OWBPA dictates that a valid waiver under the Act and the enforceability of the waiver are inextricably linked; adherence to the terms of the Act is fundamental to enforcement. "The critical point is not

[17] This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumptions's application to a given statutory scheme. "The purpose of Congress is the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208, (1985), (citations omitted).

that the Act fails specifically to do away with ratification. It is instead that the ratification doctrine is logically inconsistent with the specific terms of the OWBPA." *Long v. Sears, Roebuck & Co.,* 105 F. 3d at 1540 n. 17 (3rd Cir. 1997) The common law fiction of a "new promise" forged from retention of benefits has no place in the statutory scheme of the OWBPA. *Id.* at 1539.

The common law doctrine of ratification is not supported by the text of the OWBPA. Congress clearly mandated that an individual "may not" waive his rights; Further, the legislative history, is replete with reference to legislative purpose in resolving an unsettled area of law and void of proviso prohibiting retention[18]. Finally, when the OWBPA is enforced as interpreted by the Fifth Circuit[19], the effect would be contrary to the purpose of the statute in providing extraordinary protective measures for older workers who are asked to execute waivers and relinquish Federal rights.

[18] A substitute bill was proposed which included an offset for damages received if a waiver was set aside for any reason. There was no mention of ratification or tender back. This provision was rejected and not included in the final version of the bill. H.R. Rep. No. 664, 101st Cong., 2d Sess. (1990)

[19] "The Court is now concerned with the enforcement of a new promise which gives rise to a new legal obligation. As a new promise that creates a new obligation, it is not subject to the Waiver requirements of § 626, and thus, such requirements pose no bar to its enforcement." *Wamsley,* 11 F.3d at 540, n. 11

II. REQUIREMENT OF TENDER-BACK UPON FINDING OF INVALID WAIVER IS INCONSONANT WITH THE PURPOSE OF THE OWBPA

Once an employee's waiver of ADEA rights has been deemed invalid because the employer has failed to comply with the requirements of the OWBPA or is otherwise found not to be "knowing and voluntary" then this Court must determine whether the retention of or failure to tender-back benefits obtained pursuant to execution of the invalid waiver operates to prevent an employee from pursuing a claim under the ADEA. Congress assiduously defined what must be included in a knowing and voluntary waiver under the ADEA, and characterized the legal effect of a waiver which fails to satisfy the statutory requirements as being unenforceable. The common law concept of tender-back, as a pre-requisite to suit, is so closely aligned with that of ratification[20] that it should be rejected for the same reasons discussed above. In addition, the judicial precedence of this Court does not provide support for the argument that a tender-back of benefits received, pursuant to a waiver which violates the OWBPA, should be a condition precedent to suit. Likewise, the purposes of the Act and the equitable considerations underlying it dictate that a tender-back argument should be rejected.

A. *The Hogue Analysis of Rejection of Tender Back*

This Court has previously rejected a tender back requirement in the context of a suit arising under the Federal Employees Liability Act (FELA). 45 U.S.C. § 51 et seq.;

[20] "States that require a tender to challenge a release sometimes use the language 'condition precedent to suit' and sometimes use the language of 'ratification'. But there is no meaningful difference between the two." *Issacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1372 (C.D.Ill. 1991)

Hogue v. Southern Ry. Co., 390 U.S. 516, (1968) This Court ruled that a requirement to refund consideration obtained under an invalid waiver, "as a prerequisite to institution of suit would be 'wholly incongruous with the general policy of the Act...' " *Hogue* 390 U.S. at 518 (citation omitted) Such a requirement would override the protection provided by the Act. The Court's interpretation of the fundamental objective of the Act-to protect employees' due process rights to recover under the Act-served as the foundation for the ruling. *Id.*

This rationale was applied to a waiver under the ADEA, pre-OWBPA, by the Eleventh Circuit Court of Appeals in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), in which the Fifth Circuit's ruling in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) regarding tender back was rejected. 927 F.2d at 221. (*Grillet* is a pre-OWBPA decision in which the Fifth Circuit first abandoned the totality of the circumstances approach with regard to determining "knowing and voluntary" and resorted to strict contract law doctrine.) The Eleventh Circuit ruled that the deterrence factor cited in *Hogue*, "that a tender requirement would deter meritorious challenges to releases in FELA lawsuits" applied to ADEA claims. *Forbus*, 958 F.2d at 1040. As explained by the Court:

> "Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such

> conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case." *Id.* at 1041 (11th Cir. 1992)

Numerous Courts have applied the *Hogue* analysis in rejection of a tender back requirement in lawsuits brought pursuant to other federal statutes wherein Congress preempted common law standards. For example, the Ninth Circuit in *Botefur v. City of Eagle Point, Oregon,* ruled that a civil rights plaintiff was not required to return or offer to return consideration received pursuant to a valid waiver agreement as a prerequisite to initiating a § 1983 action premised on the violations purportedly released by the agreement. *Botefur,* 7 F.3d 152 (9th Cir. 1993). The Court held that the rule announced in *Hogue,* that tender back is not required for suit under the FELA, is generalized to suits under other federal *compensatory* statutes where no justification exists for qualifying a plaintiff's rights. *Id.* at 156.[21]

In *Oberg v. Allied Van Lines,* 11 F.3d 679, 683 (7th Cir 1993), the Seventh Circuit, rejected the tender back requirement under the newly enacted provision of the OWBPA

21 *See also, Home Box Office, Inc. v. Spectrum Electronics, Inc.*, 100 F.R.D. 379, 382 n. 1 (E.D.Pa. 1991) (not citing *Hogue* but holding that under antitrust law, benefits available under federal law cannot be defeated by state common law rules; no ratification where plaintiffs failed to tender back); *Washner v. American Motors Sales Corp.*, 597 F.Supp. 991 (E.D.Pa. 1984) (not citing *Hogue* but finding Pennsylvania law with respect to ratification of releases incongruous with Automobile Dealer's Day in Court Act where Act was intended to provide redress for the very activity alleged; amount retained was to be set off against any damages); *Smith v. Pinell,* 597 F.2d 994, 996 (5th Cir. 1979) (plaintiff allowed to proceed under Jones Act despite having signed release and received settlement; Jones Act analogize to FELA).

based upon the *Hogue* rationale in *Forbus.* The Court in *Oberg,* followed by the Sixth Circuit in *Raczak,* 103 F.3d 1257, 1269 (6th Cir.1996) and the Third Circuit in *Long,* 105 F.3d at 1540 (citing *Oberg*), was convinced that analogizing the policy of the ADEA to that of the FELA, and thus applying *Hogue,* was correct. *Oberg,* 11 F.3d at 684; *see also, Constant v. Continental Telegraph Company,* 745 F. Supp. 1374 (Co.Ill. 1990); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (R.D. Ill. 1991) (relying on *Hogue* to reject tender requirements in an ADEA case).

There is no principle distinction between FELA and the OWBPA, and thus, this Court's precedent should govern here.[22] Indeed, both FELA and OWBPA are statutes intended to protect the rights of employees against the superior power of the employer and in both instances, requiring the individual to return the money in order to proceed with a suit would effectively nullify the protection afforded specifically by Congress.

As a remedial statute, ADEA promotes recovery for injured older workers subjected to age discrimination and acts as a deterrent to employers from engaging in discriminatory behavior. As stated by the Court in *Long*:

> '[I]t is impossible to view the ADEA as anything other than a federal remedial statute. The ADEA was enacted in order to further the dual goals of compensating discrimination victims and

22 The Court in *Wamsley* argued that the facts of *Hogue* are clearly distinguishable from the facts relied upon under the ADEA statutory scheme primarily because Hogue's physical injury was not in dispute. *Wamsley,* 11 F.3d at 540-52. The Fifth Circuit fails to consider that the FELA is not a worker's compensation statute, thus liability of the employer is an element of proof (sipulated to by the parties in *Hogue*) equally burdened upon the FELA claimant as it is upon the ADEA claimant.

> deterring employers from practicing discrimination. As the Supreme Court wrote in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995); "[t]he private litigant who seeks redress from his or her injuries vindicates both the deterrence and compensation objectives of the ADEA.' " 105 F.3d 1529, 1541 (3rd Cir. 1997).

No justification exists, in common law or otherwise, to qualify an older worker's right to these statutory benefits by imposing a tender back requirement.

B. *Tender Back Not Supported By Legislative History or Intent*

The OWBPA, in providing statutory guidelines in favor of employees, clearly stands for the edict that employers should not be permitted to exploit their superior bargaining positions and the vulnerable conditions of their older workers by forcing them to sign away their rights. *See, Coventry v. United States Steel Corp.*, 856 F.2d 514 (3rd Cir. 1988). In *Coventry,* the Court ruled that the employer placed unfair economic pressure on the claimant to sign a waiver when faced with the option of having all of his income and benefits ceased immediately. *Id.* at 524. As stated by Chairman Edward R. Roybal in addressing the necessity of the OWBPA:

> ". . . An older worker, faced with the likely prospect of termination and knowing the difficulties of finding another job at an older age, is in a desperate situation. He often has no alterntive but to take whatever benefits the employer is willing to offer him, even if it means giving up fundamental employment rights. Furthermore, it is highly unlikely that, at this point, the older

> worker even knows what fundamental rights he is entitled.
>
> I believe that this is totally unacceptable. Employers should not be permitted to exploit their superior bargaining position, and the vulnerable condition of older employees by forcing them to sign away their rights. By allowing this to continue, we are simply encouraging employers to engage in discriminatory employment practices." *Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor,* 101st Cong., April 18, 1989.

The facts of this case are a clear example of the "egregious behavior" cautioned by the *Forbus* Court if employers are allowed to so easily circumvent the law. Imposing a tender back as a precedent condition to filing suit would allow employers to violate the OWBPA requirements at will with little threat that an employee would be in a position to relinquish needed funds or rejuvenate spent funds once the employee realizes that he has been subjected to discrimination.

"[A] tender requirement where a waiver is defective under the OWBPA would effectively eviscerate the act." *Long,* 105 F.3d at 1542. "No matter how egregiously releases might violate the requirements of the [OWBPA], employees would be precluded from challenging them unless they somehow...come up with the money they were given when allegedly forced into retirement." *Issacs v. Caterpillar, Inc.*, 765 F.Supp. 1359, 1367 (C.D. Ill.1991) Further, to bar a worker who has executed a void waiver from challenging

it by his inability to tender back the consideration received, would in effect "make the release enforceable as a practical matter." *Fleming v. United States Postal Service AMF O'Hara, et al*, 27 F. 3d 259, 261 (7th Cir. 1994). The Respondent, in effect, seeks judicial validation of and avoidance of ramifications for its unlawful acts in violating the OWBPA.

Public policy considerations support the determination that retirees or older workers should not be required to tender back their benefits, retirement or otherwise, obtained pursuant to a waiver agreement, as a prerequisite to the maintenance of a lawsuit. *Long*, 105 F.3d at 1541; *Issacs*, 765 F.Supp. at 1366-68. The OWBPA was specifically designed to prevent egregious behavior on the part of employers in forcing older workers into early retirement or out of the workforce for the economic benefit of the company, and this Court should reject a tender requirement as a prerequisite to instituting a challenge to a waiver in an ADEA case.

The Fifth Circuit has rejected the application of *Hogue* in ADEA cases suggesting that the statutes serve different purposes. *Wamsley*, 11 F.3d 534, 540. "Congress advanced FELA's purpose of providing liberal recovery of injured rail workers... No such purposes underlie the ADEA." *Id.* at 542; see also, *Rivers v. Northwest Airlines, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 1217 (E.D.Mo. 1995) (failure to tender back benefits precluded ADEA claim even where waiver was deficient under OWBPA).[23] This distinction misses the point-indeed the remedies available under the ADEA exceed those available under FELA. The important similarity, however, between the statutes is that they afford broad and specific

[23] The Fourth Circuit in *Blistein v. St John's College* does not discuss the issue of tender back. *Blistein*, 74 3d. 1459

protection to workers, protection that would be lost if a tender back requirement was superimposed on the statute-or if a tender back requirement were written into the waiver agreement itself.

The enforcement of the common law doctrine of tender back places an employee in a severely disadvantaged bargaining position in contrast to the employer - a specific concern raised time and again in the legislative history of the Act.[24] Senator Melcher, Chairman of the Special Committee on Aging, explained the underlying policy concern:

> This is important because of the inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but also will forfeit any present or future benefits to which they may otherwise be entitled." 133 Cong. Rec. §14383 (Oct 15, 1987)

It is just as obvious that an employee, who feels coerced into waiving his rights due to financial exigency or because of an inability to recognize the potential of a claim since no actual dispute exists with the employer, will not be in a better financial position at a later point in time, when newly acquired information reveals potential discrimination on the part of the employer. If he later learns that he was replaced by a younger worker, he still does not have the financial

[24] "[A]s long as there is a financial incentive involved and as long as the worker cannot know how the overall offer is structured or what the overall patterns of the company are, the signing of a waiver becomes in effect coercive." S. Hrg. No. 24, 101st Cong., 1st Sess. (1989) at 7.

wherewithal to tender back.[25] Most workers will consume the consideration received pursuant to executing the waiver on living expenses while seeking alternative employment. Also, as an older worker, there is a real possibility of not being able to obtain employment at an equivalent salary.[26] This was exactly the case with Ms. Oubre who testified that the only job she was able to obtain post EOI was not enough to pay her bills. Each month she has to dip into savings in order to make ends meet. She cannot afford to tender the money back and was placed in this predicament by EOI - the violators of OWBPA.(Joint Appendix A-60)

C. *Tender Back Requirement Is Not Grounded in Equity*

Applying a ratification-tender back rule where the employer has drafted an invalid waiver could require employees who did not receive the information required under the OWBPA, to make uniformed choices. These employees would be forced by the ratification and tender back doctrines to decide, in the continued absence of information, whether to surrender severance pay or waive all clalims under the OWBPA. Employees whose waivers are defective under the OWBPA would be no better off than before the OWBPA was enacted; they could be forced to make critical decisions without information deemed essential by Congress for those decisions to be knowing and voluntary. "Courts which have applied the tender... principles to ADEA releases

[25] One Court would alleviate this potential "hardship" on the employee by disallowing an option to tender back altogether, *Hodge v. New York College of Podiatric Medicine*, F. Supp. 579, 584 (S.D.N.Y. 1996) (tender back an impossibility following ratification)

[26] Once out of work, older workers have less than a 50/50 chance of ever finding new employment. See Age Discrimination in Employment Act-Waiver of Rights, S. Hrg. No. 717, 100th Cong., 2d Sess. (1988) at p. 149 (testimony of Carin Ann Clauss).

which fail to conform to the OWBPA have rendered the [Act] meaningless." *Long*, 105 F.3d at 1542.

In espousing the rule that a tender back is required, the Fifth Circuit Court simply fails to take into consideration public policy or reality issues. Take for example the plight of Ms. Oubre, a single woman relying solely upon her own income, who received severance funds of a little more that $6,000.00 (on a monthly basis, as opposed to a lump sum), which sums she used to pay living expenses while she sought other employment. Oubre is currently making one-half the salary she earned at EOI and would suffer a hardship if required to tender back the funds received from her employer to proceed with her suit.[27] (Joint Appendix A-60)

Rather than focusing on either the purpose of the Act or the plight of the worker, the Fifth Circuit raises the spectre that employers will face protracted litigation with employees who will use the compensation (paid by the employer to avoid litigation) to finance their lawsuits. *Wamsley*, 11 F.2d at 539. This argument not only ignores the economic reality of the comparative disparate financial position of the employee juxtapose to the employer,[28], but also ignores the clear intent of the Act to place the burden on the employer with regard to defending a waiver utilized in the termination of an older worker. "Any benefit that flows from

[27] "The Congressional assumptions underlying the OWBPA posit that most covered employees need severance benefits to fund living rather than legal expenses." *Long*, 105 F.3d at 1543 (3rd Cir. 1997)

[28] "[E]mployees with baseless claims have strong incentives to keep severance payments rather than risk them in prolonged litigation" *Long*, 105 F. 3d at 1543.

the use of the waiver flows entirely and directly to the employer who would be entitled to raise the existence of a waiver in any subsequent claim or charge by the individual of age discrimination." H.R. Rep. No. 664, 101st Cong., 2d Sess., (1990) "The OWBPA was designed to protect employees negotiating with employers, not protect employers from over-reaching plaintiffs." *Long,* 105 F.3d at 1543. Thus, compliance with the statute and non-participation in discriminatory practices, coupled with utilization of Rule 12 and Rule 56 of the Federal Rules of Civil Procedure, will alleviate the employer's concerns of "protracted" litigation with nefarious claimants.[29]

The choice the District Court would place before older employees, as adopted from *Wamsley,* amounts to no choice at all: pursue your claim at the risk of your livelihood. Testimony before Congress established that older workers facing termination "could not afford" to do so without separation benefits. *Age Discrimination in Employment Waiver Protection Act of 1989; Hearing on 5.54 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources,* 101st Cong., 1st Sess. 61 (1989) (Testimony of Robert Patterson).

An older worker, such as the petitioner, faced with the likely prospect of termination and knowing the difficulties of finding another job at an older age, is in a desperate situation. She had no alternative but to take whatever benefits the employer was willing to offer her, even if it meant giving up fundamental employment rights. The provisions of the OWBPA was enacted to avoid precisely this situation and

[29] "[T]he managers do not intend to disturb the law as it existed prior to passage of this bill including the law under Rule 12 and Rule 56 of the Federal Rules of Civil Procedure." Rep. Clay, Floor Manager, S. 1511 Final Substitute: Statement of Managers, 101st Cong., 2d Sess.

thereby to create a "level playing field" between employer and employee. When allowed to ignore these requirements, the employer is placed in a favored position to exercise its superior bargaining power to the disadvantage of the employee. The argument urged by the courts of the Fourth and Fifth Circuits, that it is inequitable for the employee to "have it both ways" by retaining funds and pursuing suit against the employer, neglects the fact that the employer then receives a windfall.

> "When an employee must tender severance benefits prior to suit, it is very difficult to return that employee to his pre-release position. He is not restored to employment, the employer may still assert the release as an affirmative defense, and there is no guarantee that the employee will ever obtain the information to which he is entitled under OWBPA. 'Such an exchange would arguably unjustly enrich the employer.' " *Long,* 105 F.3d at 1544, citing *Issacs,* 765 F. Supp. 1367.

Employers are clearly in a better position to protect their own interests than is an older worker. One of the simplest protections for the employer is to comply with the Act.

Ratification or an impractical tender-back requirement, as argued by the respondent, would nullify the protective measures of the Act and allow an employer to bait an older worker to waive his rights. For example, it would be clearly impermissible for an employer to offer $5,000 00 to an individual who wants to seek advise of counsel, but offer $10,000.00 if the individual waives this right. Yet, what the respondent is seeking in this case is no different-it seeks to obtain the option of buying an invalid waiver by playing on the vulnerabilities of older workers such as the claimant.

The respondent would place older workers in a financial position where they must use their "severance" pay to survive financially and then require them to pay it back (tender) if they choose to go forward with a claim, thus making enforceability of the Act an impossibility.

An additional equitable argument to be proffered in applying the *Hogue* non-tender back holding is that under the tender back doctrine the claimant would be required to relinquish all waiver consideration-even that obtained for waiver of other violations of law or contract. *Long*, 105 F.3d at 1544. While it can be argued that the consideration offered by the employer was to "buy its peace" in general, it appears that a full tender would unduly benefit the employer and penalize the employee, *See Isaacs*, 765 F.Supp. at 1370.

The waiver at issue is a general waiver, one that waives the employer from numerous types of claims, all of which other than the ADEA claim, are arguably barred. To require tender of the full amount of consideration would force an employee to return a sum that typically incorporates consideration for multiple factors not challenged in an age case including a public relations benefit to the employer that itself may deter other litigation.

III. CONCLUSION

The holdings of the Courts of the Fourth and Fifth Circuits in applying the common law fiction of ratification from a retention of benefits, or a condition precedent of tender back, is inconsistent with the language and the spirit of the OWBPA. Such an application works a hardship on employees who could not have known that by accepting and retaining consideration in exchange for a waiver of rights, they were in effect, declining the protection of the OWBPA. Given the clear and specific goals of OWBPA, the common law

doctrine of ratification and tender-back can not and should not apply when courts are confronted with determining the results of an invalid OWBPA waiver.

The facts of the case presented are typical. An employer will use its superior bargaining position to place unfair economic presure on a claimant to sign a waiver. Congress was cognizant of this fact when it drafted the OWBPA and incorporated numerous requirements that afforded an older worker with meaningful protection against employer abuse.

Pursuant to the Congressional history previously presented, it is clear that the legislative intent regarding interpretation of the OWBPA and the implementation of the Act was to be strictly construed with regard to compliance with the requirements of the statute. The Act plainly states that an individual "may not" waive any right or claim under the ADEA unless the waiver is "knowing and voluntary". It thereafter clearly sets forth the minimum requirements for a knowing and voluntary waiver. If these requirements are not met the waiver is invalid.

The legislative history of the Act indicates that the fundamental purpose of the OWBPA waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion or mistake of material fact. By allowing the enforcement of a waiver that fails to comply with the OWBPA, the Courts of the Fourth and Fifth Circuits ignore this Congressional mandate. When Congress enacted the ADEA, it had in mind not only to provide benefits to victims of discrimination, but also

to create incentives to companies to obey the law. The provisions of the OWBPA reinforced these dual purposes.

To allow unrestricted and unlimited use of invalid waivers and to apply existing contract law to determine their enforceability will circumvent the intent of the law. The facts as presented in this case clearly show how an employer can circumvent the spirit of the law and be rewarded for it.

Thus, for the reasons argued above, this Court should hold that a waiver which does not comply with the OWBPA and is otherwise not knowing and voluntary is invalid and not enforceable reversing the decision of the lower court and remand this matter to the District Court for trial on the merits.

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No. 96-1291

In The
Supreme Court of the United States
October Term, 1997

Dolores M. Oubre,
Petitioner,
v.

Entergy Operations, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the established common law rule that a party may not rescind a contract unless it has first tendered back the consideration it received pursuant to the contract applies to suits brought by an employee under the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.*, in contravention of a bargained-for release and waiver of rights that fails to meet the requirements of the Older Workers Benefits Protection Act, 29 U.S.C. § 626(f).

STATEMENT REQUIRED BY RULE 29.6

Respondent Entergy Operations, Inc. ("EOI") is a wholly-owned subsidiary of Entergy Corporation. EOI does not have any subsidiary companies.

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BRIEF FOR RESPONDENT

STATUTE INVOLVED

The Older Workers Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f), is reproduced in the Appendix to this brief.

INTRODUCTION

For well over a century, it has been an established rule of law that one who has received benefits under a contract will not be heard to challenge the validity of the contract without first returning the consideration paid pursuant to the contract. The very idea of a party coming into court, seeking to avoid the burdens of a contract while retaining its benefits, has long been viewed as repugnant to fundamental principles of fair dealing and equity. Petitioner and her *amici* in this case urge this Court to displace this established common law rule—which finds expression in the caselaw of each of the 50 States—by inventing a special rule of "federal common law" allowing plaintiffs to sue under the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.*, without returning (or even *offering* to return) the money they received from their employers in settlement of potential ADEA claims. The Fifth Circuit properly declined the invitation to override state law, given the text and purposes of the ADEA and the OWBPA, and this Court should do the same.

STATEMENT OF THE CASE

This case comes to the Court on a grant of summary judgment. As such, all disputed issues of material fact must be resolved, at this juncture, in favor of petitioner Dolores M. Oubre. Nevertheless, it should be noted at the outset that there has been no finding that petitioner was constructively discharged on the basis of her age. That vigorously disputed issue of ultimate fact has yet to be determined. Respondent Entergy Operations, Inc. ("EOI") stands ready and willing to litigate petitioner's

claim of age discrimination on the merits. All EOI asks is that petitioner, having repudiated the release agreement between the parties, fulfill her common law duty to make a timely return of the approximately $6,000 EOI paid her on the faith of that agreement before subjecting EOI to the very litigation she pledged not to bring. That is not too much to ask before being haled into court after "buying your peace"; indeed, the law requires no less.

Factual Background

1. EOI operates five plants located throughout Arkansas, Louisiana and Mississippi that generate electricity through the use of nuclear power. In 1994, EOI implemented a new employee ranking procedure called the "Management Planning and Review Ranking Process." Under the Ranking Process, all salaried employees in EOI's Waterford Steam Electric Generating Station ("Waterford 3") located in Killona, Louisiana were ranked in relation to their peers in two separate categories: performance and potential. These rankings were then transferred onto a nine-box matrix, with Group 1 identifying employees who ranked high in both categories and Group 9 identifying employees who scored low in both categories. For all employees who fell into Group 9, EOI offered to develop a personalized "Action Plan" aimed at assisting them in improving their performance and becoming better employees. Employees unwilling to rectify their deficiencies pursuant to an Action Plan were offered the option to resign, in which case they became eligible, upon executing a waiver of rights, to receive a severance payment from EOI.

2. When the Ranking Process was instituted, petitioner, then 40 years old, was a salaried employee in the Planning and Scheduling Department at Waterford 3. Initially hired as a clerk in June 1987 from a temporary employment agency (App. A-10, A-26), she served as a computer operator until she and the other employees in the Department were given the title of "Assistant Scheduler." App. A-35. Her specific job title was "Assistant Outage Scheduler." App. A-10 to A-11. That position

involved computer systems operations and management—tasks which petitioner admitted having "not much knowledge" about except for the "little things" she learned on the job. App. A-32.

The first round of reviews under the Ranking Process were conducted during late 1994. Of the 18 assistant schedulers in the Planning and Scheduling Department, only two received a score of 9. Petitioner was one of the employees who was rated deficient in both performance and potential.

On January 17, 1995, petitioner's direct supervisor and the Department Manager met with her and informed her of her poor ranking. At that meeting, petitioner was advised that, if she wished, "an Action Plan would be written for [her]" (App. A-40), which would have been aimed, among other things, at improving her computer skills. App. A-43. She was also told that if she was not willing to undertake the hard work that would be required to improve her skills, she could accept a voluntary severance package and resign. App. A-38. At the conclusion of the meeting, her supervisor handed her a packet of information pertaining to the severance option (an Action Plan tailored to her particular needs would have to be developed and thus was not available at that time). App. A-44. In order to enable her to consider her options fully and without pressure, EOI gave her two weeks paid leave, with full benefits.

Subsequently, she carefully reviewed the contents of the package, including a letter explaining those contents and the release she understood she would have to sign in order to receive severance benefits. App. A-45. After discussing the matter with a friend of hers and thoroughly reading the letter on several occasions. (App. A-45 to A-46), petitioner contacted EOI's Human Resources Department to confirm certain aspects of the severance package. App. A-46 to A-47. On or about January 24th, she sought and obtained legal advice from not one, but *two* different attorneys as to her rights and

obligations under the release. App. A-19, A-48. She again met with her direct supervisor in person on January 31st and received confirmation of the information she had been given during their initial meeting regarding the Action Plan if she elected to proceed with it.

As she would later "admit[]" under oath, at the conclusion of this extensive and careful deliberative process, she "understood the terms of the severance package" App. A-19. During the January 31, 1997 meeting, she informed her supervisor that she "was ready to sign the release." App. A-51. Accordingly, she took the release out of the packet and duly executed it in their presence. *Id.* The release was countersigned on behalf of EOI, and the paperwork was submitted for processing to arrange payment to petitioner in accordance with the agreement. *Id.*

The release reads, in relevant part, as follows:

> I, Dolores M. Oubre, knowingly, voluntarily, and for valuable consideration agree to waive, settle, release and discharge any and all claims, demands, damages, actions, or causes of action occuring on or before the date of the execution of this Release, whether known or hereafter discovered, that I may have against Entergy Operations, Inc, its parent corporation, subsidiaries, affiliates, officers, directors, employees, agents, and legal representatives and their respective successors, heirs, and assigns ("the Company"), which in any way relate to my employment by or my separation from the Company.
>
> I acknowledge that I was provided with a copy of this Release, that I was advised to discuss this Release with my lawyer, and that I was given no less than 14 days within which to consider signing this Release. I have thoroughly reviewed this Release and understand that, to the extent I have any claims covered by this Release, I am waiving potentially valuable rights by signing below. My execution of this Release is free and voluntary and was not procured through duress, coercion, or undue influence.

> I UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY SIGNING THIS RELEASE, I AM OBTAINING ADDITIONAL MONIES AND BENEFITS FROM THE COMPANY IN THE FORM OF A VOLUNTARY SEVERANCE PACKAGE TO WHICH I WOULD NOT OTHERWISE BE ENTITLED. I UNDERSTAND, ACKNOWLEDGE, AND AGREE TO ALL THE TERMS OF THIS AGREEMENT.

App. A-61.

True to its word, EOI paid petitioner the full amount she had been promised under the voluntary severance package. App. A-52. As agreed, every two weeks, from February 1995 until June 6, 1995 (*id.*), EOI delivered to petitioner a ratable share of the total severance benefit. On every occasion, petitioner accepted the funds from EOI, and spent the proceeds on what she termed "living expenses." *Id.*

Petitioner accepted and spent these monies even though, by her own later admission, she had planned all along to sue EOI in violation of the release. As she admitted in her deposition, she decided to sue EOI "[r]ight after" she consulted her two lawyers, which was one week *before* she signed the release and weeks *before* she began receiving the severance payments from EOI. App. A-55. Despite the fact that she never intended to honor the release, petitioner misled EOI into believing otherwise, and accepted each and every payment she received over the ensuing months.

3. As a prerequisite to filing suit (see 29 U.S.C. § 626(b)), petitioner's next step was to file a charge of age discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), which has enforcement responsibilities under the ADEA. See 29 U.S.C. § 626. On June 26, 1995, the EEOC issued petitioner a "Dismissal and Notice of Rights" stating, in part, that "[b]ased upon the Commission's investigation, the Commission is unable to conclude that the information obtained estab-

lishes violations of the [age discrimination] statutes." See App. A-7. Petitioner, by this point represented by her current attorney (the *third* she had retained during this episode), filed this lawsuit in the United States District Court for the Eastern District of Louisiana on September 26, 1995, almost eight months after she signed her release, and three months after receiving the final installment on the severance payments. She sought monetary relief under the ADEA and Louisiana law, alleging she had been "constructively discharged" on the basis of her age.[1]

Even though petitioner, by her actions, completely repudiated the release, she never repaid—or even *offered* to repay—the severance benefits she received from EOI. App. A-53. In fact, during her deposition on April 12, 1996, petitioner testified that, if she had to "give back the $6,258" she received in order to proceed with her lawsuit, she probably would not be willing to repay the money using "[w]hat is in [her] savings" or otherwise. App. A-60. Even though, at 42 years of age, she is single and apparently has no dependents to support (App. A-25), and even though she has since found employment elsewhere (App. A-60), she indicated that giving back the money "would be a very hard decision [for her]." *Id.*

Procedural Background

After completion of the discovery process, EOI moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. It argued that, although the release failed to meet all of the numerous formal requirements for a "knowing and voluntary" waiver of ADEA

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[1] Although a complaint filed in federal court must allege all facts necessary for the exercise of jurisdiction, *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990), and although the ADEA does not confer subject-matter jurisdiction over an employer with fewer than 20 employees, *see* 29 U.S.C. § 630; *Walters* v. *Metropolitan Educ. Enters.*, 117 S. Ct. 660 (1997), petitioner has not alleged that EOI has 20 or more employees. Instead, petitioner merely has alleged that "Defendant, Entery [sic] Operations, Inc., employed greater than eight (8) employees during all times pertinent hereto." App. A-5 (¶ V).

rights under the OWBPA, 29 U.S.C. § 626(f), petitioner could not maintain suit in contravention of the release without first returning (or "tendering back") to EOI the money it had paid her on the faith of the release. In support of that contention, EOI relied, *inter alia*, upon *Wamsley* v. *Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), which held that "justice and equity require the employee who seeks to avoid the obligations to which he agreed under the settlement agreement to return the consideration which he received for his promise not to sue" as a condition precedent to bringing suit. *Id.* at 542.

The district court granted the motion. Notwithstanding the failure of the release to "meet some of the[] criteria" set forth in the OWBPA (App. A-20), the court ruled that "[t]he undisputed facts here fit squarely into the rule set forth in *Wamsley*." *Id.* The Fifth Circuit agreed, and issued a unanimous unpublished opinion affirming "for the reasons enunciated by the district court." App. A-22 to A-23. This Court granted certiorari, limited to the third question presented by petitioner.

SUMMARY OF ARGUMENT

This Court should decline petitioner's invitation to overrule the long-standing common law rule that a party may not challenge a contract or transaction without first returning the fruits of the contract or transaction. The tender-back rule has existed for more than a century, and is based on the unfairness of permitting a party to retain the benefits of a transaction while repudiating its obligations or duties. The rule finds expression in a number of common law principles, including the doctrines of ratification, equitable estoppel and rescission.

Each of these doctrines bars petitioner from maintaining suit in this proceeding without making the required tender of the consideration respondent paid her in exchange for her release. Petitioner, in what can only be termed a fraudulent scheme, falsely informed respondent that she was willing to release any claims she might have

in order to receive severance benefits to which she otherwise would not have been entitled. She ultimately signed the release even though, as she admitted below, she had already decided to sue respondent, and thus never had any intention of honoring the release. By virtue of her deception, she received more than $6,000 in severance benefits and never, over the entire four-month period that the benefits were paid to her, informed respondent of her intentions. Because she never tendered back or offered to tender back the severance benefits prior to filing suit, petitioner's suit is barred under the settled common law doctrines discussed above.

In a desperate attempt to avoid the consequences of her actions, petitioner urges the Court to take the rare step of fashioning a special rule of federal common law that would permit her to go forward despite the patent inequity of her conduct in this case. Such judicial lawmaking would plainly be improper. It is well settled that the common law will not be superseded by statute unless the express language of the statute clearly manifests congressional intent to override the common law. The text of the OWBPA demonstrates no such intent, nor does the legislative history. Simply stated, the OWBPA and the tender-back rule do not conflict; indeed, they are wholly consistent. The tender-back rule, as reflected in the doctrines of ratification, estoppel and rescission, recognizes, as it must under the OWBPA, that a release that does not meet the statutory requirements for a "knowing and voluntary" waiver is voidable at the election of the employee, and may not be enforced against the employee. In this sense, the tender-back rule petitioner assails, in contrast to the peculiar rule petitioner advocates, gives an employee complete protection against an invalid waiver but also the freedom to retain and enforce against an employer what he perceives to be a favorable settlement. The tender-back rule, as applied in the ADEA context, merely requires a would-be plaintiff who has discovered grounds for avoiding a release of rights to return the consideration received for the release within a reasonable period of time but no later than the time of suit.

Contrary to the assertion of petitioner and her *amici*, this Court's two-page, *per curiam* decision in *Hogue* v. *Southern Railway*, 390 U.S. 516 (1968), does not compel rejection of the tender-back rule. That decision addressed the rule in the context of a very different statute, the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, which was enacted for the purpose of providing a liberal and expeditious means of recovery for injured railroad workers. Unlike FELA, the ADEA was not enacted to strip an employer of its common law defenses or to subject the employer to almost certain liability. To the contrary, relief is available under the ADEA only where the employee can make the difficult showing that he was discriminated against on account of his age, and where the employee can withstand the employers' assertion of a number of statutory defenses, including the bona fide occupational qualification defense. *Hogue*, simply put, is *sui generis*, and provides no basis for overriding the tender-back rule under the ADEA.

Finally, failure to apply the tender-back rule under the ADEA would frustrate the congressional goal of promoting settlement and voluntary conciliation of age discrimination claims. Given the difficulty of determining whether a release is "knowing or voluntary," as defined in the OWBPA, employers will have no incentive to voluntarily provide displaced workers with any sort of severance benefits if employees can retain the benefits for use as a "war chest" in later litigation. Significantly, adoption of the tender-back rule would not, as petitioner charges, insulate age discrimination from court challenge, in view of the EEOC's clear statutory authority to initiate and bring enforcement proceedings notwithstanding any waiver by an employee who, unlike petitioner, has been the victim of age discrimination.

In the alternative, if this Court were to reject the tender-back rule as a general matter, it should retain the rule where as here, the employee has fraudulently induced an employer to enter a release agreement. There is no federal policy to encourage fraud, yet that is pre-

cisely what petitioner has committed in this case. Petitioner deceived respondent into believing that she intended to honor her release of claims, knowing full well that she would bring suit in violation of the release as soon as she received for her final payment. At a minimum, the tender-back rule should be retained for such cases of fraudulent inducement.

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

ARGUMENT

I. PETITIONER'S CHALLENGE TO THE VALIDITY OF HER RELEASE IS BARRED BECAUSE SHE HAS REFUSED TO PERFORM HER DUTY TO TENDER BACK TO RESPONDENT THE BENEFITS IT PAID HER PURSUANT TO THE RELEASE.

Petitioner and her *amici* discuss the "tender back" rule solely in terms of the common law doctrine of ratification, which is "the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise." *Wamsley*, 11 F.3d at 538. Indeed, petitioner quite explicitly equates the two, asserting that the tender-back rule "is so closely aligned" with ratification that it cannot stand independent of ratification. Pet. Br. 32. By equating the tender-back rule with ratification, petitioner and her *amici* unduly minimize the breadth and force of the tender-back rule at common law.

As the law books make clear, the tender-back rule is not synonymous with ratification. To the contrary, the rule merely finds expression in that doctrine, and in other deeply rooted doctrines of the common law, *i.e.*, equitable estoppel and rescission. Each of these doctrines forecloses petitioner's unfair—indeed, *fraudulent*—attempt to retain the benefits of the release while, at the same time, attacking the release in order to avoid her obligations thereunder. *No* court—whether at law or equity, or whether under the rubric of ratification, estoppel or rescission—would approve of such sharp dealing, which is plainly

contrary to the basic standards of honesty and fair dealing demanded by the law.

A. By Retaining The Consideration Respondent Paid Her After She Secretly Resolved To File Suit In Violation Of Her Release Agreement, Petitioner "Ratified" The Transaction She Now Challenges.

Under the ratification doctrine, it is "well settled" that a party who learns of grounds to avoid (or "disaffirm") a "voidable" transaction "must act promptly, '[a]nnounce his purpose and adhere to it.' "[2] *Shappirio* v. *Goldberg*, 192 U.S. 232, 242 (1904). A prompt election is required because to remain silent despite knowledge of grounds for disaffirmance "is wholly inconsistent with an election to undo the transaction and stand upon his right to rescind the contract." *Id.* at 243. If a party wishes to disaffirm, "he must return to the other party what he has received, so as to put him in the same position he was in before," and must do so within a reasonable time. *Gay* v. *Alter*, 102 U.S. (12 Otto) 79, 80 (1880). The "reasonable time" for making the tender does not begin to run until the party has the information necessary to determine that the contract is voidable. See *Hoyt* v. *Latham*, 143 U.S. 553, 568 (1892) (holding that "[i]n cases of actual fraud, or of want of knowledge of the facts, the law is very tolerant of delay"). Unless the benefits received are tendered back within a reasonable time, "a ratification would be presumed" to have occurred.

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[2] A contract is "voidable" if "one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." Restatement (Second) of the Law of Contracts § 7 (1981) ("Restatement"). The classic examples of voidable contracts are contracts procured by fraud, duress or coercion, or mistake of fact. *Id.* § 7, cmt. b. By contrast, a contract is "void" if "the law neither gives a remedy [for its breach] nor otherwise recognizes a duty of performance." *Id.* § 7, cmt. a. Although "[i]llustrations of agreements that are wholly void of legal effect are not very numerous," a contract premised on an "illegal bargain," such as a contract to commit murder, is a rare example of a void contract. 1 Joseph M. Perillo, *Corbin on Contracts* § 1.7, at 21-22 (Rev. ed. 1993).

Indianapolis Rolling-Mill Co. v. St. Louis, Fort Scott & Witchita R.R., 120 U.S. 256, 259 (1887).

Although the theory differs somewhat, the ratification rule is similar in operation to the familiar rule of rescission at law. Under the common law rule, the party with the power to avoid a contract cannot sue unless he makes a pretrial tender of the consideration he received. See 1 Dan B. Dobbs, *Laws of Remedies* § 4.8, at 673 (2d ed. 1993). Such a tender was necessary because "[u]nder the 'at law' procedure for restitution, the court does not effect the rescission upon which restitution is based; the plaintiff effects the rescission, and the court gives a judgment for restitution if that is needed." *Id.* at 674; see also, *e.g.*, *Savers Fed. Sav. & Loan Ass'n* v. *First Fed. Sav. & Loan Ass'n*, 768 S.W.2d 536, 538 (Ark. 1989). Stated differently, under the common law rule, the tender is no empty formality—it is, to the contrary, the very act that produces the rescission, freeing the plaintiff to bring an action for damages.

The equity courts of both past and present took a slightly different approach to the problem of rescinding a voidable contract other than a settlement agreement. It was the chancellor, not the would-be petitioner, who decreed rescission. See 1 Dobbs, *Law of Remedies* § 4.8, at 675. Given that rescission would not occur in equity until entry of a court decree at the conclusion of the proceeding, there was no simultaneous retention of benefits and repudiation of burdens and, accordingly, no need for a pretrial tender by the plaintiff. *Id.* Even so, equity courts would not decree rescission absent some guarantee (usually in the form of a decree conditioned on tender) that he who had sought equity would do equity, which would include tendering back the consideration he had received. *Id.* The celebrated flexibility of equity, however, was replaced by rigidity, even in run-of-the-mill contracts, where it was plain that he who sought equity had no intention of doing equity.[3]

[3] Although it arose out of an unfortunate set of facts, the decision of Justice Daniel, sitting by designation in *Garland* v. *Bowling*, 10

Importantly, given the nature of a release agreement, a pretrial tender is required even under the more flexible rule of equity. In a release agreement or settlement, one side gives up the right to assert and prosecute a claim for relief, in exchange for payment or some other consideration from the opposing party. When petitioner filed suit notwithstanding her prior release, she, by force of her own actions, rescinded the release and reclaimed the "property" she had previously surrendered in consideration of the severance payments (*i.e.*, her causes in action).

According to a leading treatise:

> The special feature of such cases [where suit is filed in violation of a release or settlement agreement] is that the plaintiff gets restitution merely by suing. What he gave up in the transaction was the right to sue. If he is allowed to proceed, he has taken back what he gave, whether or not he wins the ultimate claim. For this reason, *the logic of restitution would seem to require an immediate, pre-trial restoration by the plaintiff of whatever settlement sums he received under the release.*

2 Dan B. Dobbs, *Law of Remedies* § 9.3(3), at 590 (2d ed. 1993) (emphasis added); *cf. Garland* v. *Bowling*, 10 F. Cas. 5 (C.C.D. Ark. 1855) (pretrial tender back required where option of granting relief in equity conditioned on restoration is not available). Consequently, the option of entering an award of restitution in petitioner's favor conditioned on a requirement that she first

F. Cas. 5 (C.C.D. Ark. 1855), is illustrative. In that case, a slavemaster sought to enjoin enforcement of a damages award rendered against him for the purchase price of five slaves. The court ruled that the slavemaster's failure to tender the slaves back was "a complete bar to relief." *Id.* at 5. Justice Daniel explained: "His object appears to be to enjoin the collection of the purchase-money and retain the negroes. Such conduct a court of equity cannot sanction. If he desires to rescind the contract for any cause whatever, and is entitled to do so, he is bound to restore to the adverse party what he received from him. This is demanded by the rules of equity and fair dealing, and is without exception in the forum of conscience. He cannot hold the property of another, and refuse to pay for it." *Id.*

tender back the consideration she received would not have been available to an equity court.

Even after the merger of law and equity, courts have insisted on pretrial tender of consideration where suit is brought in contravention of a settlement agreement. At least two courts have explicitly rejected appeals to merger of law and equity as a basis for abrogating the tender-back rule. See, *e.g.*, *Stefanac* v. *Cranbrook Educ. Community*, 458 N.W.2d 56, 66 (Mich. 1990) ("We hold as a matter of law that a plaintiff must, in all cases where a legal claim is raised in contravention of an agreement [of settlement], tender the consideration recited in the agreement prior to or simultaneously with the filing of suit."); *Doe* v. *Golnick*, 556 N.W.2d 20, 23 (Neb. 1996) ("When a person seeks to avoid the effect of a release because it is either void or voidable, he or she must first restore or offer to restore whatever he or she has received for executing the release."). Scores of other decisions have applied the tender-back rule to suits brought in contravention of a release or settlement notwithstanding the merger of law and equity. See, *e.g.*, *Midwest Petroleum Co.* v. *Department of Energy*, 760 F.2d 287, 291-92 (Temp. Emer. Ct. App. 1985); *Asberry* v. *United States Postal Serv.*, 692 F.2d 1378, 1381 (Fed. Cir. 1982).[4] On this issue, therefore, law and equity point to the same conclusion—a plaintiff cannot be permitted to maintain suit after settlement without first tendering back the consideration received pursuant to the settlement agreement.

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[4] *See also, e.g.*, *Morta* v. *Korea Ins. Corp.*, 840 F.2d 1452, 1455 n.4 (9th Cir. 1988); *Anselmo* v. *Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985); *Spradling* v. *Blackburn*, 919 F. Supp. 969, 977 n.19 (S.D. W. Va. 1996); *Edmondson* v. *Dressman*, 469 So.2d 571, 573 (Ala. 1985); *Larsen* v. *Johannes*, 86 Cal. Rptr. 744, 751 (App. 1970); *Prall* v. *Indiana Nat'l Bank*, 627 N.E.2d 1374, 1379 (Ind. App. 1994); *Meisel* v. *Mueller*, 261 S.W.2d 526, 534 (Mo. App. 1953); *Todd* v. *Berner*, 693 P.2d 506, 509-10 (Mont. 1984); *Davis* v. *Hargett*, 92 S.E.2d 782, 785 (N.C. 1956); *Maust* v. *Bank One Columbus*, 614 N.E.2d 765, 770 (Ohio App. 1992); *Guion* v. *Guion*, 475 S.W.2d 865, 869-70 (Tex. Civ. App. 1971).

As the courts below correctly ruled, petitioner is barred under the ratification doctrine from proceeding on her claims against EOI. Contrary to the requirements of the common law, petitioner did not tender back the severance pay she received by virtue of the release within a reasonable period of time following her discovery of grounds to avoid her release. In fact, she has *never* made a tender of benefits. In a suit seeking legal relief—and petitioner's claim for liquidated and compensatory damages under the ADEA plainly constitutes such relief, see *Lorillard* v. *Pons*, 434 U.S. 575 (1978)—petitioner's failure to make a pretrial restoration of the consideration itself is fatal to her claim in terms of the common law. See, *e.g.*, *Gay* v. *Alter*, 102 U.S. (12 Otto) at 80. Indeed, no one—neither petitioner nor her *amici*—suggests the contrary.

B. Because Petitioner, By Word And Deed, Induced Respondent To Pay Her Valuable Consideration Which She Otherwise Would Not Have Received, And Brought This Action Without Tendering The Consideration Back To Respondent, Petitioner Is Estopped From Challenging Her Release.

Petitioner's suit also founders on the common law doctrine of equitable estoppel. As this Court has noted, the doctrine is "older than the country itself." *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959); see generally 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 802, at 1635 (4th ed. 1918) ("*Equity Jurisprudence*") ("Estoppel was recognized by the common law at a very early day."). As Lord Coke explained long ago, there are three basic categories of estoppel: (1) estoppel by record; (2) estoppel by deed; and (3) estoppel in pais, commonly referred to as equitable estoppel. *Id.*

The first two types of estoppel, collectively referred to as "legal estoppels," are distinguished from equitable estoppel. Legal estoppels "exclude the evidence of"—or "stoppeth" one's mouth to assert—"the truth, and the equity of the particular case, to support a strict rule

of law on grounds of public policy," such as not impeaching public records or deeds. *Id.* at 1636-37. As its name suggests, equitable estoppel seeks a fundamentally different objective—namely, "to avoid injustice in particular cases," *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 59 (1984).

As Pomeroy explains:

> Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. *Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights* which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel[.]

Equity Jurisprudence § 802, at 1635-36 (second emphasis added; footnote omitted); see also, *e.g.*, *Insurance Co.* v. *Wilkinson*, 80 U.S. (13 Wall.) 222, 233 (1871). In other words, this branch of estoppel "proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."[5] *Morgan* v. *Railroad Co.*, 96 U.S. (6 Otto) 716, 720 (1877).

In this sense, equitable estoppel is wielded not as a sword, but rather as shield against the inequitable assertion

[5] Although common law courts sometimes said that equitable estoppel applied only where "fraud" had occurred, "courts of equity . . . have always treated the word 'fraud' in a very elastic manner." *Equity Jurisprudence* § 803, at 1640. In keeping with that elastic interpretation, courts of equity "apply the term 'fraudulent' to the party estopped" when faced with "his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be *fraudulent*,—would be a *fraud* upon the rights of the person benefited by the estoppel." *Id.* If it were otherwise—that is, if misrepresentations made with intent to defraud were required—then the doctrine of equitable estoppel would be "a mere instance of legal fraud." *Id.*

of a "technical advantage . . . set up and relied upon to defeat the ends of justice or establish a dishonest claim." *Wilkinson*, 80 U.S. (13 Wall.) at 223. Although legal estoppel was once disfavored as unduly harsh, equitable estoppel—which has bridged the divide between law and equity, see *id.*—has long been favored because it promotes fairness, honesty and justice. See, *e.g.*, *Morgan*, 96 U.S. (6 Otto) at 720 ("The principle [of equitable estoppel] is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat.").

The doctrine has been repeatedly employed to estop a party from denying or avoiding the burdens of a transaction while retaining the benefits of that transaction. The operative principle was fully explained by this Court in *Insurance Co.* v. *Wilkinson* as follows: "[W]here one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience to assert, he would not in a court of justice be permitted to avail himself of that advantage." 80 U.S. (13 Wall.) at 233; see also, *e.g.*, *McLean* v. *Clapp*, 141 U.S. 429, 432 (1891) ("[T]he law is clear that [one] cannot take the benefits of [a] contract and repudiate its burdens."). In these circumstances, the knowing and inequitable retention of benefits while attacking the validity of a transaction estops the challenger.[6]

[6] *See also, e.g., Thompson* v. *Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937); *Magee* v. *United States*, 282 U.S. 432 (1931); *Frost* v. *Corporation Comm'n*, 278 U.S. 515 (1929); *Exchange Trust Co.* v. *Drainage Dist.*, 278 U.S. 421 (1929); *Buck* v. *Kuykendall*, 267 U.S. 307 (1925). Of course, estoppel would not preclude a challenge to a transaction that itself was a violation of law. *See Reiter* v. *Cooper*, 507 U.S. 258, 266 (1993) (common carrier paid to ship goods not estopped from suing shipper to recover undercharges unlawful under filed-rate doctrine); *Bement & Sons* v. *National Harrow Co.*, 186 U.S. 70 (1902) (beneficiary of contract can resist enforcement on grounds that contract violates antitrust laws). The transaction here at issue—a settlement of a potential age discrimination claim—obviously is not illegal, even if the release fails to com-

The rule of estoppel has been applied in a wide range of contexts to prevent the inequitable assertion of legal rights. Thus, for example, courts have routinely estopped parties in possession of benefits from questioning the validity of contracts, see, *e.g.*, *United States ex rel. Int'l Contracting Co.* v. *Lamont*, 155 U.S. 303 (1894); settlement agreements, see, *e.g.*, *McLean* v. *Clapp*, 141 U.S. 429 (1891); conveyances, see, *e.g.*, *Buffum* v. *Peter Barceloux Co.*, 289 U.S. 227 (1933); *Keller* v. *Ashford*, 133 U.S. 610 (1890); and judgments or administrative orders, see, *e.g.*, *Federal Power Comm'n* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Winslow* v. *Baltimore & Ohio R.R.*, 208 U.S. 59 (1908).[7]

Where estoppel is premised upon the knowing retention of benefits, it is within the power of the party wishing to challenge the transaction under which he received those benefits to free himself from the effect of the estoppel. Because the source of the inequity in this context is denying one's duties while retaining the benefits received in consideration of those duties, the estoppel can be eliminated entirely by tendering back to the other party the benefits received. As this Court held in *Buffum* v. *Peter Barceloux Co.*, upon surrendering the benefits of the transaction, "[t]he basis for an estoppel is cut away." 289 U.S. at 234; see also, *e.g.*, *Barnett Nat'l Bank* v. *Murrey*, 49 So.2d 535, 536 (Fla. 1950); *Bender* v. *Bateman*, 168 N.E. 574, 575 (Ohio App. 1929).

ply with the procedural requirements of the OWBPA, 29 U.S.C. § 626(f)(1).

[7] The state decisions are in accord. For cases applying this estoppel rule to bar a challenge to a contract, *see, e.g.*, *Young* v. *Burchill*, 274 P. 379 (Cal. 1929); *W.B. Leedy & Co.* v. *Shirley*, 104 S.E.2d 580 (Ga. App. 1958); *Payette Lakes Protective Ass'n* v. *Lake Reservoir Co.*, 189 P.2d 1009 (Idaho 1948); *P.V. & K. Coal Co.* v. *Kelly*, 191 S.W.2d 231 (Ky. 1945); *Wasserman* v. *Autohaus on Edens, Inc.*, 559 N.E.2d 911 (Ill. App. 1990); *Savage* v. *Wyatt Lumber Co.*, 64 So. 491 (La. 1914); *Schnack* v. *Applied Arts Corp.*, 278 N.W. 117 (Mich. 1938); *Otero* v. *Wheeler*, 701 P.2d 369 (N.M. 1985); *Andreasen* v. *Hansen*, 335 P.2d 404 (Utah 1959); *Phillips Petroleum Co.* v. *Taggart*, 73 N.W.2d 482 (Wis. 1955); *see also, e.g.*, *Certified Roofing Co.* v. *Jeffrion*, 22 So.2d 143 (La. App. 1945) (same as to settlement agreement).

As applied to this case, it is clear that the doctrine of equitable estoppel precludes petitioner from proceeding with this lawsuit. She remains in possession of the consideration she received for the release, and it is undisputed that respondent would not have paid her those funds but for her waiver. At the same time, however, petitioner challenges the validity of her waiver of rights under the OWBPA. Worse still, petitioner obtained those benefits through active fraud. She informed respondent that she was willing to sign a release, actually signed a waiver, and accepted thousands of dollars in severance payments, knowing all the while that her real intent was to sue respondent notwithstanding the release. It is precisely to guard against such inequitable conduct that the common law made liberal use of equitable estoppel. It is both unquestioned and unquestionable that, absent federal law to the contrary, petitioner is estopped to challenge her waiver until she tenders back to respondent the full amount of the severance payments she has received.

II. THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO OVERRIDE THE COMMON LAW TENDER-BACK RULE IN THE NAME OF FEDERAL COMMON LAW BECAUSE THE RULE DOES NOT CONFLICT WITH THE OWBPA OR THE ADEA.

Petitioner, seeking to avoid the force of principles of equity and fair dealing that have commanded universal support in the common law for more than 100 years, asks this Court to legislate a radically different answer to the policy question answered long ago by the tender-back rule. Specifically, petitioner urges the Court to fashion "what one might call 'federal common law' in the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton* v.

FDIC, 117 S. Ct. 666, 670 (1997). In this petitioner entreats the Court to make free-wheeling use of a lawmaking power reserved for Congress, save only in discrete classes of exceptional cases involving either uniquely federal interests or a delegation of authority to fashion an entire body of law.[8] See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981). This reticence to resort to common-law decisionmaking divorced from state law has both separation of powers and federalism dimensions. "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives." *Id.* at 312-13; see also, *e.g.*, *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981) (stating that "the federal lawmaking power is vested in the legislative, not the judicial, branch of government"). In short, as this Court has repeatedly declared, " '[t]here is no federal general common law.' " *O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994) (quoting *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938)).

With these principles in mind, it becomes clear just how heavy petitioner's burden is to justify her proposed radical departure from the common law. To prevail on

[8] Petitioner erroneously suggests (Pet. Br. 29) that it is respondent who seeks a federal common law rule in this case. Respondent's position is that this Court should *refrain* from such lawmaking under the OWBPA through use of settled and universally accepted common law doctrines, such as estoppel, ratification and rescission. Because the relevant question here is whether those doctrines may be applied under the OWBPA, it is only of "theoretical interest" whether state law controls of its own force, or simply provides the content of the federal rule of decision in this area. *O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994).

her claims in this Court, she must show either (1) that application of state common law rules "would . . . contradict an explicit statutory provision," *id.* at 85; or (2) that "there is a 'significant conflict between some federal policy or interest and the use of state law.' " *Id.* at 87 (internal citation omitted). Petitioner's arguments fall far short of the mark on both counts, as explained below.

A. The OWBPA Does Not Displace The Tender-Back Rule Because The Statute Does Not "Speak Directly" To The Issue And Because The Rule Is Fully Consistent With The Text And Legislative History Of The OWBPA.

Petitioner argues (Pet. Br. 23-31) that the tender-back rule is barred by the text and legislative history of the OWBPA. Her basic argument is two-fold: first, a waiver of rights that does not meet each of the formal requirements of the OWBPA for a "knowing and voluntary" waiver "is invalid and has no effect," and thus is not subject to ratification (Pet. Br. 25); and, second, the purpose of the OWBPA was "to displace common law doctrine provisions with respect to waivers for age discrimination claims." Pet. Br. 27. These arguments are addressed, in turn, below.

1. *OWBPA Text.* The starting point for the analysis is the text of the OWBPA. That statute, which was added in 1990 as an amendment to the ADEA (see Pub. L. No. 101-433, 104 Stat. 978 (1990)), provides that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). It further provides that "a waiver may not be considered knowing and voluntary unless at a minimum" it meets numerous formal requirements set forth in § 626(f)(1)(A)-(H). The statute places on the employer the burden of proving that a waiver is "knowing and voluntary" as defined in the OWBPA. *Id.* § 626(f)(3).

The Solicitor General, as *amicus curiae*, argues that the statutory enumeration of particular requirements that

must be met in order for a release to be valid, and the placement on the employer of the burden of proving satisfaction of those requirements, "reflect a displacement" of common law principles in general. U.S. Br. 14. Although these aspects of the OWBPA specify requirements not found in the common law rules, it requires a breathtaking leap of logic to argue from those specific requirements that Congress rejected *all* relevant common law principles. The more logical conclusion, given the maxim "Inclusio unius, exclusio alterius," is that where Congress wished to depart from common law principles, it included specific language to that effect in the OWBPA. See *O'Melveny & Myers*, 512 U.S. at 86. More fundamentally, a legislative "desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993). Thus, any conclusion that common law principles are not to be applied here must be drawn from other aspects of the OWBPA.

In considering whether the language of the OWBPA supersedes the common law's tender-back rule, an important interpretive principle must be applied. "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813)). Despite petitioner's assertion that this rule does not "entail[] a requirement of clear statement" (Pet. Br. 30 n.17), the law is plainly otherwise—which is why it is "'the *language* of the statute'" that must "'be *clear and explicit*'" before the common law is deemed supplanted. *Norfolk Redev. & Hous. Auth.*, 464 U.S. at 35 (emphasis added).[9]

[9] In *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991), this Court declined to apply the "clear statement" require-

This Court unanimously reaffirmed this rule in *United States* v. *Texas*: "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." 507 U.S. at 534 (quoting *Mobil Oil Corp.* v. *Higginbotham*, 426 U.S. 618, 625 (1978)); see also *id.* at 540-41 (Stevens, J., dissenting) (agreeing that "we are reluctant to infer a legislative abrogation of the common law" and "expect Congress to *state clearly* any intent to reshape that terrain") (emphasis added); but see *Long* v. *Sears Roebuck & Co.*, 105 F.3d 1529, 1539 n.17 (3d Cir. 1997) ("[W]e believe that it would be wrong to conclude, as does the dissent, that simply because ratification is *not rejected in the text or legislative history* of the OWBPA that the common law is unchanged.") (emphasis added).[10]

ment to the question of administrative issue preclusion in the ADEA context. It did so, however, because administrative (in contrast to judicial) preclusion does not "represent independent values of such magnitude and constancy to justify the protection of a clear-statement rule." *Id.* at 109. The tender-back rule, which arises out of numerous common law doctrines, is a fundamental principle of justice in the administration of the law that dates back to the days of Lord Coke. As such, it certainly is entitled to the protection of the clear statement rule. Moreover, consistent with the clear statement rule, the *Astoria* Court ultimately grounded its refusal to give collateral estoppel effect to state agencies' administrative findings on the text and structure of the ADEA, not on legislative history or the disembodied "purposes" of the statute. *See id.* at 111-13.

[10] The sole authority petitioner cites (Pet. Br. 30 n.17) in opposition to a clear-statement rule for superseding the common law, *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), dealt with the determination of whether state law is preempted under the Supremacy Clause, and thus has no bearing here. Petitioner (Pet. Br. 13) and the Solicitor General (U.S. Br. 19) proffer a snippet from the legislative history stating that "the [Senate Labor and Human Resources] Committee intends that the requirements of [the OWBPA] be strictly interpreted to protect those individuals covered by the Act." S. Rep. No. 101-263, at 31, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537 ("*Senate Report*"). Such a fleeting statement "that is in no way anchored in the text of the statute" is entitled to no weight because "courts have no authority to enforce a principle

Read with these principles in mind, it is plain that the OWBPA does not repeal the common law tender-back rule, as incorporated in the concepts of ratification, rescission and equitable estoppel. These bases for the tender-back rule are considered *seriatim* below.

a. As for ratification, petitioner correctly concedes that it is a "common-law principle [that] is well established" (Pet. Br. 30). She and her *amici* go astray, however, in arguing that three words from § 626(f)(1)—the "may not waive" language—absolutely preclude application of the ratification doctrine. According to petitioner, "a plain reading of the statute prohibits a waiver of ADEA rights by an employee unless the requirements of the statute are met". Pet. Br. 23. Respondent agrees with that statement—the statute does plainly preclude enforcement of a "waiver" of rights that is not knowing and voluntary under § 626(f). Where petitioner and her *amici* err is in their assertion that adherence to the ratification doctrine produces a "waiver" of rights.

The cursory textual analysis offered in opposition to the tender-back rule founders on the meaning of "waiver" —which petitioner and her *amici* never pause to consider. Because "waiver" is a "judicially defined concept," "it is presumed . . . that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989). The concept of waiver is well defined in this Court's precedents: "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Resort to the principle that remedial legislation should be broadly construed—which this Court has termed "th[e] last redoubt of losing causes," *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry*

gleaned solely from legislative history that has no statutory reference point." *Shannon* v. *United States*, 512 U.S. 573, 583-84 (1994) (editorial revisions and internal quotation marks omitted).

Dock Co., 514 U.S. 122, 135 (1995)—cannot justify expanding "waiver" beyond its accepted meaning in the law. As Justice Harlan stated for the Court in *United States* v. *Zacks*, 375 U.S. 59 (1963), the "remedial" nature of a statute cannot "be stretched to expand the reach of a statute." *Id.* at 68; see also, *e.g.*, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979) (holding that "generalized references to the 'remedial purposes' of [a statute] will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit'").

In this case, there has been only one waiver of rights by petitioner—the release she signed in order to acquire the severance benefits respondent offered to all employees who elected to resign instead of entering a program to improve their deficient performance. Although petitioner "admitted" under oath that "she understood the terms of the severance package" (App. A-19), and although she admittedly entered into the release only as part of a dishonest scheme to obtain severance benefits without any good-faith intention to honor the release (App. A-55), respondent does not contend that she is bound by the release she signed. To the contrary, respondent recognizes (as did the courts below) that the release cannot be enforced against her because it failed to comply with a number of the technical requirements of the OWBPA.

The fact that a right to sue under the ADEA cannot be defeated by a waiver not in compliance with the OWBPA does not suggest that the right cannot be lost—or forfeited—through other means. As Justice O'Connor explained for the Court in *Olano*, "[w]aiver is different from forfeiture," the latter concept being defined as "the failure to make the timely assertion of a right." 507 U.S. at 733. That is precisely respondent's point with regard to ratification—petitioner's claims are barred because she failed to assert them in timely fashion. The ratification rule is reducible to the following two propositions: (1) when a party learns of grounds to rescind a prior agreement or transaction, "he must act promptly, '[a]nnounce his

purpose and adhere to it'," or lose the right to do so, *Shappirio* v. *Goldberg*, 192 U.S. 232, 242 (1904); and (2) an essential component of the prompt action and announcement of purpose required is "return-[ing] to the other party what he has received, so as to put [the defendant] in the same position he was in before." *Gay* v. *Alter*, 102 U.S. (12 Otto) 79, 80 (1880). Petitioner, by failing to make the required tender within a reasonable time after she discovered grounds for avoiding the release agreement, has forfeited—*not* waived—her right to press ahead with her claims in court. See *Olano*, 507 U.S. at 733.

The theory of ratification is not that the party with the power of avoidance is precluded by the original contract or transaction. It is, instead, that the party's retention of the consideration must be construed as an implied "promise to perform" the original contract, and it is that implied promise—*not* the antecedent, originally voidable promise—that the doctrine of ratification enforces. Restatement § 85. As the Fifth Circuit has explained, "[r]atification operates to allow a party having the power to avoid his contractual duty to make, or be deemed to have made, a new promise to perform his previously voidable duty [on the promisor's part]." [11] *Wamsley*, 11 F.3d at 538; see also *Blistein* v. *St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996).

[11] In arguing that "any new promise made through ratification is also subject to OWBPA" (U.S. Br. 18), the Solicitor General again overlooks the meaning of "waiver," as did the Third Circuit in ruling that ratification can be sustained only by "say[ing] that Congress only intended that the OWBPA requirements apply to the 'first' waiver." *Long*, 105 F.3d at 1539-40. A promise implied in law to honor a prior waiver of ADEA rights is, by definition, not itself a waiver. *See Wamsley*, 11 F.3d at 540 n.11. This Court drew a similar distinction in explaining why the unenforceability of an unlawful contract does not defeat the requirement that the consideration be restored: "[T]he action [for restitution] is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do

Petitioner and her *amici* argue that a release that does not meet the requirements of the OWBPA is "void" and therefore incapable of being ratified. That is not so. The OWBPA simply "d[oes] not characterize the legal effect of a release which fails to satisfy the statutory requirements." *Long*, 105 F.3d at 1535. Given that established common law rules are retained unless expressly superseded by statute, see *United States* v. *Texas*, 507 U.S. at 534, the silence of the OWBPA on the legal effect of a noncomplying waiver compels the conclusion that such a release is merely "voidable" rather than "void." At common law, the fact that a contract was not knowing or voluntary "did not void a contract, but, rather, only rendered that contract voidable." *Blistein*, 74 F.3d at 1466 (citing Restatement § 7, cmt. b).

Even on its own terms, the Solicitor General's argument that noncomplying waivers are void utterly fails to persuade. As he correctly notes, "[t]he propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised." U.S. Br. 15 (quoting Restatement § 7, cmt. e). There can be no doubt that the underlying transaction here at issue—a waiver of legal rights—has traditionally been viewed as valid. As long ago as the 19th Century, it was settled that "[a] party may waive any provision, either of a contract or of a statute, intended for his benefit." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872). The presumptive waivability of legal rights persists to this day. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-01 (1995) ("Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption."); see also *id.* at 213 (Souter, J., dissenting) (agreeing that the law incorporates a "fallback rule of permissible waiver").

that, to make compensation for, property or money which it has no right to retain." *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 60 (1891).

Indeed, the very purpose of the OWBPA was to *adopt* (with certain modifications) the EEOC's proposal (29 C.F.R. § 1627.16(c) (1987)) to provide expressly that employees are free to settle age discrimination claims with their employers without Commission supervision. It is true that Congress suspended the proposed regulation for three years, but the fact is that Congress, after conducting hearings and adding a number of additional procedural protections to those proposed by the EEOC, cleared the way for unsupervised settlements, as the Commission had proposed, by enacting the OWBPA. As a consequence, it cannot be denied that "federal law *expressly approves* the use of early retirement incentives [and other forms of consideration] conditioned upon the release of [ADEA] claims." *Lockheed Corp.* v. *Spink*, 116 S. Ct. 1783, 1791 n.6 (1996) (emphasis added) (citing OWBPA); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("[S]ettlements of ADEA claims . . . are clearly allowed.").

To be sure, waivers, though traditionally, are not invariably, permitted, see *Mezzanatto*, 513 U.S. at 201, and the OWBPA clearly provides that an individual "may not waive" rights under the ADEA unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). This language does not dictate a conclusion that noncomplying waivers are completely void. Rather, it is entirely consistent with the "may not waive" language—and fully consistent with the intent of Congress—to hold that noncomplying waivers are voidable by, and unenforceable against, the employee. As the formal requirements set forth in 29 U.S.C. § 626(f)(1)(A)-(H), as well as § 626(f)(1)'s ban on unknowing and involuntary waivers, suggest, the concern of Congress was that employees be protected against waiving their rights due to pressure from their employers or ignorance of their rights and the relevant facts. See *Blistein*, 74 F.3d at 1466. Employees receive the full measure of that protection if a noncomplying waiver is viewed as voidable rather than void because it is hornbook law that, unless ratified based on full

knowledge of the facts giving rise to a power of avoidance, a voidable contract *cannot* be enforced against the party with the power of avoidance.[12] See generally 1 Joseph M. Perillo, *Corbin on Contracts* § 1.6, at 18 (Rev. ed. 1993).

Indeed, the Solicitor General's interpretation of the statute as rendering a noncomplying waiver absolutely void, as opposed to merely voidable by the employee, produces absurd results that Congress surely did not intend. Under that view, no matter how favorable a release is to the employee—and no matter how much the employee is satisfied with a settlement—the OWBPA "simply does not permit an employee to elect" to hold the employer to the benefit of his bargain, if the agreement embodying it fails to satisfy the procedural requirements of § 626. U.S. Br. at 17. Accordingly, any attempt by the employee to enforce the settlement agreement against an employer who reneges on the agreement would be doomed to failure because the agreement is not merely voidable but void. In this sense a victory for the employee in this case would almost certainly turn out to be a Pyhrric one for employees as a whole.

Denying an employee the power to "hold a recalcitrant employer to its bargain" would be an absurd result given "the policy of the OWBPA to protect older workers," *Long*, 105 F.3d at 1546 (Greenberg, J., dissenting). The absurdity that inheres in the Solicitor General's construction of the statute is reason enough to reject it and adopt the view that noncomplying waivers are merely voidable by, and unenforceable against, the employee. *See Public Citizen* v. *Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment); *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989).

[12] Because ratification cannot occur, as a matter of law, until the party with the power of avoidance has full knowledge of grounds for avoiding the contract, petitioner is quite wrong in her unsupported assertion that ratification occurs when "the individual cashes the check" received from the employer in consideration of a release. Pet. Br. 28.

In view of the foregoing, the OWBPA does not "speak directly" to the established common law doctrine of ratification. As the Fourth Circuit correctly held, the OWBPA therefore does not "abrogate[] the common law principle that an invalid agreement can be ratified by subsequent conduct." *Blistein,* 74 F.3d at 1465-66; see also *Wamsley,* 11 F.3d at 539. Accordingly, the ratification rule adopted by the Fourth and Fifth Circuits should be affirmed.

b. Furthermore, neither petitioner nor her *amici* attempt to show that the statutory text precludes a tender-back requirement premised upon the common law doctrines of equitable estoppel. This line of argument is available in defense of the judgment below on either of two rationales. First, estoppel is merely an alternative legal theory in support of the tender-back rule this Court granted certiorari to review. As this Court ruled in *Yee* v. *City of Escondido,* 503 U.S. 519 (1992), parties in this Court "are not limited to the precise arguments they made below," and "can make any argument in support of [a] claim." *Id.* at 534. Second, to the extent estoppel may be viewed as an independent claim not decided below, it is nonetheless properly presented here, for even where "alternative grounds were not reached below," "[a] respondent is entitled . . . to defend the judgment on any ground supported by the record." *Bennett* v. *Spear,* 117 S. Ct. 1154, 1163 (1997); see also, *e.g., Washington* v. *Yakima Indian Nation,* 439 U.S. 463, 476 n.20 (1979).

Whatever else may be said, it is surely not the case that the text of the OWBPA forecloses application of equitable estoppel. Even more clearly than ratification, a finding that an employee is estopped would not be tantamount to enforcing a waiver that does not satisfy the requirements of the OWBPA. The basis for the hoary doctrine of equitable estoppel is the inequity of permitting a party to challenge the validity of a contract while retaining the benefits received under the contract. See, *e.g., McLean* v. *Clapp,* 141 U.S. 429, 432 (1891) ("[T]he law is clear that [one] cannot take the benefits of [a] contract and repudiate its burdens."); see also, *e.g., United States ex rel. Int'l Contracting Co.* v. *Lamont,* 155 U.S. 303 (1894). The doctrine does not bind the party estopped to the invalid contract in any manner, but rather "stoppeth" his mouth from denying the validity of the contract for as long as he has failed to tender back the consideration paid him on the faith of the contract.

Unlike ratification—which is irreversible once it occurs because ratification "extinguish[es] the power of avoidance" under a voidable contract, Restatement § 7—the duration of estoppel is entirely within the control of the party subject to the estoppel. As this Court held in *Buffum* v. *Peter Barceloux Co.,* 289 U.S. 227, 234 (1933), "[t]he basis for an estoppel is cut away" once the plaintiff has returned the benefits of the transaction. The fact that estoppel is reversible shows plainly that the effect of estoppel is not to produce a "waiver," *i.e.,* a "relinquishment" or "abandonment," of the right to sue under the ADEA—terms that carry a connotation of permanency. *United States* v. *Olano,* 507 U.S. at 733. Instead, estopping a plaintiff from challenging a waiver of ADEA rights merely *suspends* his ability to bring suit pending restoration of the consideration to the defendant, a result that is compelled by "justice and equity." *Wamsley,* 11 F.3d at 542. Upon making such a restoration, the plaintiff is entirely free to proceed under the ADEA against the employer. Accordingly, the estoppel doctrine provides an independent basis for sustaining the tender-back rule applied by the Fifth Circuit below.

2. *Legislative History.* To bolster their unavailing textual arguments, petitioner and her *amici* turn to a number of arguments based on the legislative history. These arguments are offered to show that with the enactment of the OWBPA, Congress intended to wipe away *all* of the common law of contracts with respect to waivers of rights under the ADEA. Again, their arguments are unpersuasive.

Petitioner finds it "significant" that "in the body of legislative history accumulated in the two years in which Congress contemplated the [OWBPA] no reference or commentary is made championing ratification of a waiver as a bar to suit." Pet. Br. 27 n.15. Petitioner has it half-right. Not only is the legislative history barren of any statement championing ratification; there is *no statement at all* relating to ratification or equitable estoppel. Presumably, the legislative record would bear some evidence of intent to repeal the common law on these subjects if that was in fact the legislative intention.[13] See, *e.g.*, *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) (noting that a "major change" in law "would not likely have been made without specific provision in the text of the statute" and that it is "most improbable" that such a change "would have been made without even any mention in the legislative history"); but see *Long*, 105 F.3d at 1539 n.17 (dismissing as "wrong" the notion that intent to depart from the common law would necessarily be manifested "in the text or legislative history"). Accordingly, if any conclusion is to be drawn from this silence, it is that in enacting the OWBPA, Congress simply did not address—and did not intend to abolish—the tender-back rule.

[13] In fact, the legislative history does show that Congress plainly—and deliberately—changed the common law concerning the standards for determining whether a waiver is knowing and voluntary. Prior to the OWBPA, the federal courts were split on that issue under the ADEA. *Compare, e.g., Cirillo* v. *Arco Chem. Co.*, 862 F.2d 448 (3d Cir. 1988) (applying totality of circumstances test as matter of federal common law) *with Lancaster* v. *Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987) (looking to state law requirements for knowing and voluntary waiver). Both the statute (*see* 29 U.S.C. § 626(f)(1)(A)-(H)) and the legislative history plainly evince Congress' adoption of the former approach and rejection of the latter approach based on state law: "The [Senate Labor and Human Resources] Committee expreses [sic] support for the approach taken *on this limited issue* in *Cirillo* . . . and disapproves the approach adotped in *Lancaster*". *Senate Report* at 32, 1990 U.S.C.C.A.N. at 1537 (emphasis added). By contrast, *neither* the text *nor* the legislative record evidences the radical departure petitioner urges on the Court.

This conclusion carries added force because when the OWBPA was enacted in October 1990, *every* reported federal decision on the issue had ruled that an unknowing and involuntary waiver of ADEA rights could be ratified by the employee's subsequent knowing retention of benefits. See *Constant* v. *Continental Tel. Co.*, 745 F. Supp. 1374 (C.D. Ill. 1990); *O'Shea* v. *Commercial Credit Corp.*, 734 F. Supp. 218 (D. Md. 1990), *aff'd*, 930 F.2d 358 (4th Cir. 1991); *Widener* v. *Arco Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989). Had Congress intended to usher in the opposite result with the enactment of the OWBPA, it would have explicitly done so in the face of this unbroken authority upholding ratification under the ADEA, of which Congress was presumptively aware. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

The Solicitor General notes (U.S. Br. 24), as does petitioner (Pet. Br. 31 n.18), that the Minority Views of dissenting House and Senate Republicans quoted a letter from IBM that purportedly mentioned the possibility that an employee might be permitted to retain the consideration paid for a release while suing in violation of the release. See *Senate Report* at 64, 1990 U.S.C.C.A.N. at 1569 (Minority Views); H.R. Rep. No. 101-664 at 87 (1990) (Minority Views) ("*House Report*"). From this fleeting reference, as well as the failure in the House Committee of an amendment that would have given an employer the right to a credit against the judgment in the event the employee were to recover, the Solicitor General concludes that "it was understood that the OWBPA would permit an employee who signed an invalid waiver to pursue his or her ADEA claim while retaining the separation benefits paid under the waiver." U.S. Br. 24.

This is, indeed, a weak reed for the result the Solicitor General proposes. First, as the Third Circuit forthrightly acknowledged in *Long*, the proposed offset provision "did not mention ratification or tender back." 105 F.3d at 1540 n.19. It therefore bears no weight on either issue. Second, the argument fails to take account of the fact

that the offset provision was merely one provision among many in a larger bill offered by opponents of the OWBPA at a markup session as a complete substitute for the OWBPA, and no reason was given for the party-line rejection of the substitute bill or its individual provisions. See *House Report* at 87 (Minority Views). This is significant because "[r]ejection of an entire bill cannot be taken to be a specific rejection of each and every feature [of the failed bill]." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 265 (1945) (Rutledge, J.). Finally, this Court "ha[s] often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach [and effect]." *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); see also, *e.g.*, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 (1981).

Additionally the Solicitor General badly misconstrues the IBM letter—which, incidentally, was submitted in connection with a predecessor to the OWBPA, not the OWBPA itself. The letter did not address the tender-back rule at all. Instead, it simply stated that "[t]here is no reason an employer should be expected to make these significant payouts [as part of severance packages] and then have to bear the high costs of litigating ADEA claims with the recipients." *House Report* at 87; *Senate Report* at 64, 1990 U.S.C.C.A.N. at 1569. That defense of the concept of unsupervised waivers is a far cry from a plea for a tender-back requirement. For these reasons, the nuggets the Solicitor General has mined from the legislative record are, to say the least, far from shimmering.

Petitioner, not to be outdone, summons forth throughout her brief (*e.g.*, Pet. Br. 20-21 nn.6-7, 36-37) a barrage of statements from individual Members of Congress expressing their view that employers have the power to coerce older workers into signing waivers of ADEA rights. The problems with this line of argument are multiple. First, it ignores this Court's admonition that "[i]f legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating," *i.e.*, the Committee Reports of both Houses. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 580 (1995). Those documents, given enactment of the legislation, at least arguably can be viewed as evidence of the intent of Congress, but fleeting comments uttered in hearings or colloquies or statements on the House or Senate floor can hardly be viewed as a reflection of the intent of the legislative body as a whole. See *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) (Harlan, J.). For this reason, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler* v. *Brown*, 441 U.S. 281, 311 (1979).

Second, some of these statements relate not to the OWBPA, but rather to predecessor bills that were fundamentally different from the OWBPA. For instance, Senator Metzenbaum's statement at a March 16, 1989 hearing that " '[i]n th[e] non-dispute context, where employees have no reason to be on guard to protect their rights, it is simply bad public policy to allow waivers' " (Pet. Br. 20 n.6) pertained to the Employee Waiver Protection Act of 1989 ("EWPA"), S. 54, which would have forbidden all unsupervised ADEA waivers except those reached in settlement of pending age discrimination charges. See *Senate Report* at 31, 1990 U.S.C.C.A.N. at 1537. Although the EWPA was reported out of Committee in 1989, it died in Congress. The OWBPA differs radically from the earlier bill, however, because it *allows* unsupervised waivers even in the context where Senator Metzenbaum condemned waiver as "bad public policy" —where the employee has not filed a discrimination charge.[14] By allowing unsupervised waivers, Congress

[14] Congress apparently heeded the EEOC's concerns about the House equivalent to the EWPA, the Age Discrimination and Employment Waiver Protection Act of 1989 ("ADEWPA"), H.R. 1432, 101st Cong. (1989). The then-Chairman of EEOC testified that the Commission was "concerned" that the ADEWPA, by barring unsupervised waivers in the non-dispute context, "may prevent older

explicitly rejected the premise of the Fair Labor Standards Act, 29 U.S.C. § 216, whose remedial provisions are adopted by reference in the ADEA, see 29 U.S.C. § 621(b), that unsupervised release agreements between employers and employees are inherently coercive and unfair to the employee. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697 (1945) (unsupervised waivers barred under FLSA). Obviously, legislative statements pertaining to a different piece of legislation that is at odds with the OWBPA in critical respects have no relevance in determining the intent of Congress in enacting the OWBPA.

In the end, the efforts of petitioner and her *amici* to glean from the legislative history a legitimate basis for rejecting principles of the common law that date back to the time of Lord Coke—even if not an enterprise necessarily doomed to failure, see *United States* v. *Texas*, 507 U.S. at 534—fails to produce the clear legislative intent needed to overcome established features of the common law. As the Fourth Circuit correctly put it: Rejecting the tender-back rule would "allow [employees] to have it 'both ways,' to retain the benefits that they receive pursuant to their retirement [or severance] agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended. This, we find no evidence Congress contemplated." *Blistein* v. *St. John's College*, 74 F.3d at 1466.

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workers from exercising their rights rather than protecting them." *Joint Hearing Before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor*, 101st Cong. 16 (Apr. 18, 1989). In addition, he added that "[r]equiring written claims of age discrimination could inhibit employers and employees from informally resolving age claims." The OWBPA, as enacted the following year, endorsed the then-Chairman's recommendation that a "better approach" would be to "protect employees against coercion to waive their rights, while preserving their choice to waive without filing a claim with EEOC or in court," and guaranteeing the EEOC enforcement power to prosecute notwithstanding an employee waiver. *Id.* at 16-17.

B. The Purpose Of The ADEA And OWBPA Do Not Forbid Application Of The Tender-Back Rule.

Petitioner and her *amici* present two lines of reasoning in support of their view that the tender-back rule is contrary to the purposes of the ADEA. The first is based on an analogy between the ADEA and the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, the statute under which this Court's two-page, *per curiam* decision in *Hogue* v. *Southern Railway Co.*, 390 U.S. 516 (1968), rejected the tender-back rule for injured railroad workers. The second is based on an examination of the operation of the rule in light of the ADEA's policy of deterring age discrimination and the OWBPA's policy of denying enforcement to noncomplying waivers.

1. In *Hogue*, a railroad employee who had suffered a knee injury on the job agreed to accept $105 in exchange for a release. The parties entered into the settlement in the mistaken belief that the worker's knee was merely bruised and not permanently injured. 390 U.S. at 517. When it later turned out that the injury was permanent and serious, the employee, without making a pretrial tender of the $105 to the employer, filed suit seeking damages, arguing that the release was the product of a mutual mistake of fact. On appeal to this Court from a state court ruling that a pretrial tender was required, the railroad confessed error and refused to defend the judgment.[15] *Id.* at 516.

Although Justice Harlan simply voted to vacate summarily based on the confession of error, *id.* at 517, the remainder of the Court proceeded to address the merits of the appeal (with only briefing from petitioner). The Court held that "a rule which required a refund as a

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[15] The railroad "filed before argument a 'Memorandum Confessing Error' which state[d] that 'its insistence before the Georgia courts that the applicable law required a tender, and the decision of the Georgia Court of Appeals requiring a tender, were erroneous. Accordingly, respondent does not desire to offer brief or argument against petitioner on this issue, and confesses error.'" 390 U.S. at 516.

prerequisite to institution of a suit would be 'wholly incongruous with the general policy of the [FELA] to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.'" *Id.* at 518 (quoting *Dice* v. *Akron, C. & Y.R. Co.*, 342 U.S. 359, 362 (1952)). The Court added, however, that "the sum paid [as consideration for the release] shall be deducted from any award determined to be due to the injured employee." *Id.*

Petitioner argues, and the Solicitor General agrees (U.S. Br. 26), that there "is no principle[d] distinction between FELA and the OWBPA" because both statutes are "remedial" statutes enacted for the benefit of employees. Pet. Br. 35. The attempted analogy between the two statutes is unavailing. Putting aside the rather unusual circumstances in which *Hogue* was decided—which may account for the fact that this Court has *never* cited the case in the intervening three decades—the reality is that, except at the most superficial level, "these two 'remedial' statutes [are] fundamentally different in congressional purpose and intent."[16] *Wamsley*, 11 F.3d at 541 n.13.

Motivated by "humanitarian purposes," *Metro-North Commuter R.R.* v. *Buckley*, 117 S. Ct. 2113, 2117 (1997), FELA was intended not just to provide a remedy for

[16] The bulk of the decisions applying *Hogue* in other statutory contexts never proceed beyond superficial analysis, concluding that *Hogue* is applicable to *any* statute that can be characterized as "remedial," an overbroad view that petitioner and her *amici* wisely do not defend in this Court. *See, e.g.*, *Botefur* v. *City of Eagle Point*, 7 F.3d 152, 156 (9th Cir. 1993) (applying *Hogue* to § 1983 context on ground that the decision "is generalizable to suits under other federal compensatory statutes"). The rare exception is *Smith* v. *Pinell*, 597 F.2d 994 (5th Cir. 1979) (per curiam), a case under the Jones Act, 46 U.S.C. § 688; although the Solicitor General states that the Jones Act is "not as analogous to FELA as is the ADEA" (U.S. Br. 30), that statement is demonstrably incorrect. *See Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958) (terming plaintiffs under FELA and Jones Act "*perfectly* analogous" because latter statute adopted for seamen the protections provided to railroad employees under FELA) (emphasis added).

injured workers, but "to provide *liberal recovery*." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432 (1958) (emphasis added); see also, *e.g.*, *Metro-North*, 117 S. Ct. at 2124 (Ginsburg, J., concurring in judgment in part and dissenting in part). The liberal recovery in favor of railroad workers is accomplished by simultaneously "strip-p[ing] [an employer] of his common-law defenses" and requiring the railroad to account for any injuries caused "even [in] the slightest" by any negligence on the part of the railroad. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506-07 (1957); see 45 U.S.C. §§ 51, 53. Congress so completely took the injured railroad worker under its protection that it took the rare step of commissioning the federal courts "to develop a federal common law of negligence" under the statute. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 558 (1994) (Souter, J., concurring). These unusual features of FELA produce the congressionally desired result of "'unburdened and expeditious recoveries' by rail workers," *Wamsley*, 11 F.3d at 541 (quoting *Smith* v. *Pinell*, 597 F.2d 994, 996 (5th Cir. 1979)). It therefore is clear that "[t]he right of recovery under the FELA . . . is unique." *Id.* at 540.

The ADEA, however, is fundamentally different. Rather than essentially federalizing a whole area of law for the protection of employees, the ADEA takes aim at a narrow target—discrimination in employment on account of age. See 29 U.S.C. § 623. Far from facilitating liberal recovery, the ADEA makes recovery difficult. It erects a fairly stringent standard of liability under which an ADEA claim "cannot succeed unless the employee's protected trait [*i.e.*, age] actually played a role" in the employer's challenged decision. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). The stringency of the standard of liability is compounded by the fact that the ADEA "affords the employer a 'bona fide occupational qualification' defense, and exempts certain subject matters and persons" from its reach. *Id.* at 616 (citations omitted). Thus, to say the least, recovery under the ADEA is neither "liberal" nor "unburdened and expeditious."

This critical distinction between the two statutes illustrates why the *Hogue* analysis of the tender-back rule cannot validly be applied to the ADEA. Because the rules under FELA are, by design, structured so as to shift onto each railroad the cost of "the legs, eyes, arms, and lives which it consumed in its operations," *Wilkerson* v. *McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring), the statute "has effectively rendered liability of the employer a given in the great majority of cases." *Wamsley*, 11 F.3d at 542. Given the high likelihood of eventual recovery under FELA, a pretrial tender requirement would essentially be an empty formality. Under the ADEA, however, the employee's likelihood of success on the merits is far more remote (especially given the likely unavailability of the "disparate impact" theory, see *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring)). As such, a tender would not be a mere formality under the ADEA.

One last distinction is that the provision of FELA addressing releases, 45 U.S.C. § 55, is vastly more protective of railroad employees than anything in the OWBPA. Section 55 explicitly declares "void" "[a]ny contract . . . or device whatsoever" that would permit a railroad "to exempt itself from . . . liability." *Id.* This provision also expressly commands that where a sum has "been paid to the injured employee . . . on account of the injury," then that amount should be "set off" against the judgment "in any action" brought by the employee under FELA. *Id.* Thus, FELA much more clearly occupies the field of releases than does the OWBPA. Although *Hogue* declined to rely solely upon § 55 (390 U.S. at 518), the absence of a similar provision in the OWBPA cautions heavily against expanding the rule in *Hogue* to cover cases under that Act. For the foregoing reasons, *Hogue* does not, in either terms or rationale, control here.

2. As a fall-back position, the Solicitor General argues (U.S. Br. 26) that "[a] tender back requirement would enable an employer to escape sanction for age discrimination when a terminated employee lacks the resources to

tender back his severance benefits prior to filing suit." That is clearly not true. Unlike FELA, which is enforceable only through private lawsuits brought by injured workers (or their estates), the ADEA is not similarly limited in its enforcement. Under the ADEA, even where the affected employee does not sue on his own behalf, an employer guilty of age discrimination can just as effectively be called to account for its violation of the law through the independent enforcement authority of the EEOC, which, oddly enough, the Solicitor General has overlooked.

The EEOC is authorized by statute to investigate, either on its own initiative or upon the filing of a charge, any employer for violations of the ADEA. See 29 U.S.C. § 217. In the event the Commission wishes to proceed against an employer suspected of age discrimination, the EEOC can file suit in federal district court to obtain legal and equitable relief. See *id.* § 626(b). The EEOC can also seek relief—both monetary and equitable—on behalf of any employee who has been discriminated against but has not sued on his own behalf, including a court order compelling an employer to reinstate and grant back pay to an employee wrongfully terminated on account of his age. See *id.* § 216(c). Once the EEOC has opened a proceeding, moreover, "it may continue any investigation and may secure relief for all affected persons notwithstanding a request by a charging party to withdraw a charge." 29 C.F.R. § 1626.13 (1995). In conducting these enforcement activities, the EEOC can freely call upon the assistance of the affected worker, who, by statute, cannot be bound by any waiver not to file a charge or otherwise cooperate with the Commission. See 29 U.S.C. § 626(f)(4) (Supp. 1997) ("No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."). These enforcement powers are not affected in the least by an employee's waiver of rights: "No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." *Id.* Accordingly, irrespective of any release by

an employee, the EEOC has "independent authority to investigate age discrimination." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

The role of the EEOC is an important one in this statutory scheme. It ensures that even if financial inability to tender back the consideration paid an employee on a nonconforming waiver (or, for that matter, a valid and enforceable waiver) would preclude him from filing suit, the ADEA can nonetheless be enforced against the offending employer. Although the private right of action is a component of the ADEA enforcement scheme, the integrity of the enforcement scheme is not hindered by an employee's inability to assert his rights under the ADEA in court. *Cf. Gilmer*, 500 U.S. at 28-29 (upholding mandatory arbitration of ADEA claims). That presumably is why the employee's legal right to seek relief under the ADEA is "extinguished" (*id.* at 27) if the EEOC files suit on his behalf. See 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action . . .: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter.").

In light of the EEOC's broad authority to enforce the ADEA in place of the employee, the dogmatic, oft-repeated assertions of petitioner and her *amici* that application of the tender-back rule would permit employers to discriminate at will can only be regarded as disingenuous. Equally misleading is the view propounded in *Howlett* v. *Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. LEXIS 20504, *11 (6th Cir. Aug. 5, 1997), that adoption of the tender-back rule would take away any "external incentive an employer has to comply with the OWBPA" because it could achieve the benefit of a valid release—repose—without meeting the statutory requirements. The purpose of settlement is to avoid the burdens and expense of litigation. Obviously, any rational employer would prefer the *certainty* of repose (which

comes only from full compliance with the OWBPA) over the *possibility* that, through application of the tender-back rule, an employer might escape litigation on a few non-complying waivers. Therefore, the policies of the ADEA and OWBPA do not militate against adoption of the tender-back rule.

Finally, given the universality of the tender-back requirement, which arises out of various legal doctrines under both state and federal common law, it is clear that many plaintiffs face the choice of foregoing litigation or finding the resources to repay monies received as part of a settlement package. Petitioner and her *amici* make no effort to explain why, among all plaintiffs including victims of race or gender discrimination, age discrimination plaintiffs should be categorically spared this burden. See, *e.g.*, *Fleming* v. *United States Postal Serv.*, 27 F.3d 259 (7th Cir. 1994) (holding that tender-back rule does apply under Title VII).[17] At a minimum, Congress surely would have noted this radical change in the law if it had so intended.

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[17] In addition to Title VII, courts have applied the tender-back rule under such diverse statutes as the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, *Somervell* v. *Baxter HealthCare Corp.*, 966 F. Supp. 18 (D.D.C. 1997); the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, *Deren* v. *Digital Equip. Corp.*, 61 F.3d 1 (1st Cir. 1995); the Equal Pay Act, 29 U.S.C. § 206(b), *Wagner* v. *Nutrasweet Co.*, 95 F.3d 527 (7th Cir. 1996); and the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*, *Williams* v. *Phillips Petroleum Co.*, 23 F.3d 930 (5th Cir. 1994). In *Fleming*, Chief Judge Posner described the tender-back rule as "one of the most elementary principles of contract law," 27 F.3d at 260, adding that it was of such vintage that it "would surely be a component of any federal common law of releases." *Id.* at 261. Although he added that the rule "*may* have to give way" when a statute expressly regulates releases, as do FELA and the ADEA, *id.* (emphasis added), that equivocal statement, which refused to take a position on the application of the rule under the ADEA, was strictly in the nature of *obiter dictum* in *Fleming* (a Title VII case).

C. Rejection Of The Tender-Back Rule Would Significantly Reduce Employers' Incentive To Reach Out-Of-Court Settlements, Which Would Frustrate The ADEA's Explicit Preference For Voluntary Settlement Of Charges Of Age Discrimination.

Petitioner and her *amici* urge the Court to give effect to the "purposes" of the ADEA when it suits them, but then ignore an important legislative objective written explicitly into the statute—the preference for voluntary resolution of age discrimination claims through settlement and conciliation. Although the Solicitor General inexplicably seems to deny it (U.S. Br. 27 n.14), the text of the ADEA makes clear that Congress placed a premium on resolving age discrimination claims out of court whenever possible. Section 626(b) requires the EEOC, "[b]efore instituting any action [to enforce the ADEA] under this section," to "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). Similarly, under § 626(d), an individual with a potential age discrimination claim cannot file suit without first exhausting his administrative remedies before the EEOC, thereby giving the Commission the opportunity to pursue steps short of litigation to resolve the dispute. *Id.* § 626(d). These provisions eliminate any doubt that the ADEA, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, "express[es] a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carlson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

The rule that petitioner and her *amici* advocate—that an employer who has executed a defective waiver is entitled to retain the proceeds paid in consideration of the waiver indefinitely—can only frustrate the congressional policy of encouraging settlements. As this Court noted in *McDermott* v. *AmClyde*, 511 U.S. 202, 211-12 (1994), a defendant will not settle (or will

not pay as much for a settlement) if it remains open to later suit, for the simple reason that settlement will not spare it the expense and burdens of litigation. The problem is more significant here than in *McDermott*, where the collateral suits were contribution actions brought by co-defendants. Here, the collateral litigation would come from the employee—the *same* person from whom the employer attempted to "buy its peace." As the Fifth Circuit astutely noted in *Wamsley*, this raises the prospect that the employer who pays benefits to an employee in exchange for a release of an ADEA claim will essentially be funding litigation against itself. See 11 F.3d at 539 n.9. It should be obvious that many employers will not be willing to pay benefits to an employee if the employee can turn around and use those benefits as a litigation "war chest" to pay attorneys fees or costs in later court proceedings.[18]

The *Long* court, while conceding that this point is "not without merit," nonetheless rejects it with the statement that "[e]mployees with baseless claims have strong financial incentives to keep severance payments rather than risk them in prolonged litigation." *Long*, 105 F.3d at 1543. This simply fails to take account of the realities of litigation, which is often resorted to, in petitioner's words (Pet. Br. 18), to achieve "leverage" to extract payments from "deep pocket" defendants. As the court explained in *Kristoferson* v. *Otis Spunkmeyer, Inc.*, 965 F. Supp. 545 (S.D.N.Y. 1997):

> [N]o federal district court can ignore the wave of dubious and potentially extortionate discrimination

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[18] Indeed, some employers may respond to such a perverse incentive structure by exercising their prerogative to terminate employees without giving them *any* benefits, a state of affairs that would hardly be beneficial for employees as a class. Retention of consideration is not required to ensure the availability of counsel because "[f]ederal fee-shifting statutes and the promise of a contingency fee should . . . provide sufficient incentive for counsel to take meritorious cases." *Lewis* v. *Casey*, 116 S. Ct. 2174, 2191 n.4 (1996) (Thomas, J., concurring).

> cases currently flooding the federal docket. Undoubtedly part of the reason for this flood, which threatens to drown even valid anti-discrimination lawsuits in its wake, is the fact that current law enables such lawsuits to be brought at little or no economic risk to the plaintiffs, since such suits are typically brought on a contingent fee basis, with attorneys fees recoverable by prevailing plaintiffs but not by prevailing defendants. To enable a plaintiff who has already received substantial consideration for a release to keep that consideration while at the same time bringing the very lawsuit the release was intended to obviate is not only unfair on its face but is bound to encourage such doubtful litigation.

Id. at 548 (internal citation omitted).

Petitioner (Pet. Br. 29) and the Solicitor General (U.S. Br. 27 n.14) cavalierly respond to the risk of deterring settlements by asserting that employers can ensure the effectiveness of their employees' waivers through "[c]ompliance with the OWBPA's requirements." *Id.* Implicit in the assertion is the premise that it "should not be difficult for an employer to meet" those requirements. *Howlett* v. *Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. LEXIS 20504, at *12-13 (6th Cir. Aug. 5, 1997). If only that were so. In the six years since the OWBPA was enacted, the EEOC, for reasons known only to itself, has not devised a form release to guide employers in drafting releases that comply with the statute. As a result, the only guideposts employers have in performing that difficult task is the at times open-ended text of the statute, and even that point of reference is confounded by vague interpretive guidelines issued by the EEOC. See, *e.g.*, Waiver of Rights and Claims Under the Age Discrimination in Employment Act, 62 Fed. Reg. 10,787, 10,790 (Mar. 10, 1997) (proposed EEOC guideline stating that waiver agreements should avoid "long, complex sentences" and must "take into account such factors as the level of comprehension and education of typical participants") (to be codified at 29 C.F.R. § 1625.22).

Even accepting the Sixth Circuit's welcome suggestion that the statutory requirements should be read "in a common-sense manner and not dogmatically," *Howlett*, 1997 U.S. App. LEXIS 20504, at *13, the vagueness of the statute nevertheless leaves employers no room for assurance that any waiver will be viewed by a court, after the fact, as in full compliance with the OWBPA. For example, waivers must be embodied in an agreement that is "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." 29 U.S.C. § 626(f)(1)(A). Although this requirement is clear enough in some of its applications—for example, waivers intended for English-speaking employees must be written in English—in other contexts, as even the *Howlett* court was constrained to concede, "questions may arise" as to whether an agreement meets the requirement. *Howlett*, 1997 U.S. App. LEXIS 20504, at *13. On the resolution of those thorny, case-specific questions will turn the enforceability of the waiver.[10]

Moreover, the Solicitor General ignores another element of the statute that considerably undermines the ability of any employer to predict whether a waiver will meet the requirements of the OWBPA—the transcendent "knowing and voluntary" requirement. The statute provides that the specific requirements of § 626(f)(1)(A)-(H) are only "minimum" criteria, 29 U.S.C. § 626(f)(1), meaning that a release that fully satisfies all of those requirements nevertheless can be invalidated as not knowing and voluntary. Although one would naturally refer to the large body of state contract law for guidance in determining when an

[10] Moreover, the Sixth's Circuit's inquiry into maintaining "proper" incentives for compliance with the OWBPA is quintessentially legislative in nature. *See O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994). "Within the federal system, at least, we have decided that that function of weighing and appraising [competing policy interests] 'is more appropriately for those who write the laws, rather than for those who interpret them.'" *Id.* (quoting *Northwest Airlines* v. *Transport Workers Union*, 451 U.S. 77, 98 (1981)).

agreement is knowing and voluntary, the OWBPA (at least if the legislative history is to be given effect) takes away that logical point of reference. See *Senate Report* at 32, 1990 U.S.C.C.A.N. at 1537 (quoted in *supra* note 13). Thus, it will be exceedingly difficult for an employer to be certain that its releases have fulfilled the requirements of the statute until a court declares that to be the case—which, by definition, can only occur *after* the employer is subjected to the litigation which it sought to avoid.

Of course, respondent does not dispute that a noncomplying waiver of ADEA rights is unenforceable. That result is compelled by the OWBPA, and Congress' judgment must be honored. It nevertheless is an entirely separate question whether employees should be required to return, in advance of suit, the consideration they received if they wish to take advantage of a defect in a waiver. Because rejection of the tender-back rule's affirmative answer to that question would frustrate the legislative goal of promoting out-of-court resolution of charges of age discrimination, the common law rule should be adopted as controlling.

* * * *

For the foregoing reasons, "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *O'Melveney & Myers* v. *FDIC*, 512 U.S. at 89. The established common law rule precluding parties from simultaneously rejecting the burdens and accepting the benefits of a transaction has not been superseded by the OWBPA and may not be set aside in the name of federal common law.

III. IN THE EVENT THE COURT DEEMS IT APPROPRIATE TO CREATE A SPECIAL RULE OF FEDERAL COMMON LAW THAT A PRETRIAL TENDER OF CONSIDERATION IS NOT REQUIRED, THE COURT SHOULD RECOGNIZE AN "EMPLOYEE FRAUD" EXCEPTION TO THE RULE.

Even if the Court were to accept petitioner's invitation to extend the rule of *Hogue* v. *Southern Railway* to the ADEA context, it does not follow that the tender-back

rule should be rejected out of hand. After all, *Hogue* itself involved a situation where the employee had acted, at all events, in good faith in his dealings with his employer. The Court therefore had no occasion to consider whether it would be inconsistent with federal policy to require a pretrial tender of consideration from an employee who had acquired the benefits of a settlement through bad faith or fraudulent means, and so the question must be regarded as an open one.

To pose the question, respondent submits, is to answer it: There is no federal policy in facilitating fraud. The purpose of Congress in enacting the OWBPA was to protect employees against the risk that they would lose their rights under the ADEA in transactions that are not "knowing and voluntary." 29 U.S.C. § 626(f)(1). Congress, in pursuit of that worthwhile objective, did not thereby grant employees a license to defraud their employers by entering into releases without any intention of honoring them, for the purpose of receiving severance benefits. In other words, Congress gave employees a shield with which to protect their rights; petitioner seeks to convert that instrument into a sword in a campaign to defraud respondent.

Petitioner admitted in her deposition in this case that she decided to sue respondent "[r]ight after" she consulted with her two lawyers. App. A-55. That consultation occurred one week *before* she signed the release and weeks *before* she began receiving the severance payments from respondent. *Id.* Even though she admittedly never intended to honor the release, and planned all along to sue respondent, petitioner misled respondent into believing otherwise through her expression of a willingness to accept a settlement, her execution of the settlement, and her subsequent acceptance of approximately four months of biweekly payments from petitioner. She then proceeded, in the span of a few months, to spend the entire $6,000 bounty her dishonest conduct netted her, and brought suit only when that money had been spent.

This type of conduct should not be countenanced by this Court. As this Court held long ago, "neither a

plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872). The tender-back rule, if rejected as a rule for the ordinary case, should nonetheless be retained as the rule for the rare case, such as this one, in which employees entered into their release agreements with no intention of honoring them.[20] Once petitioner has returned the consideration she received through deception, respondent will stand ready to answer —and *refute*—baseless age discrimination claims.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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[20] In defense of the courts that rejected a tender-back rule, they did not encounter the extreme circumstances presented here, and thus were "not swayed" by what appeared to be a remote possibility of the type of brazen employee fraud that has occurred here. *Long*, 105 F.3d at 1543 n.25. The facts of this case show that employee manipulation and deception is more than just a hypothetical concern.

APPENDIX

APPENDIX

Older Workers Benefits Protection Act, 29 U.S.C. § 626(f):

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement

shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

FOR ARGUMENT (12)

NO. 96-1291

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES M. OUBRE
Petitioner,

versus

ENTERGY OPERATION, INC.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. The Statutory Language of the OWBPA Regulates the Enforceability of a Waiver of Rights under the ADEA Negating the Application of the Common law Doctrine of Ratification and Tender-Back

The OWBPA unambiguously states that an individual "may not waive" ADEA rights unless, at a minimum, the requirements for a knowing and voluntry waiver, found at 29 U.S.C. § 626 (f) (1) (A) - (H), are satisfied. The statutory scheme of the OWBPA was meticulously crafted by Congress.

It unequivocally mandates that a waiver which is drafted to include a forbearance of rights afforded an older worker under the ADEA is invalid if it does not meet the standard for knowing and voluntary; which can only occur if the waiver is in compliance with the requirements of the statute. The Respondent concedes that the waiver of rights at issue in the instant case is invalid under the Act and thus unenforceable against the Petitioner. (Resp. Br. 48) "That result is compelled by the OWBPA, and Congress' judgment must be honored," *Id.*

Respondent argues, however, that the petitioner has subsequently ratified the invalid waiver by failing to tender-back the monetary consideration paid for it prior to filing suit[1], or in turn is equitably estopped from filing suit because of fraudulent inducement[2]. (Resp. Br. 10-19) The

[1] The parties agree with portions of Respondent's treatise on the common law doctrine of ratification. The disagreement, however, is whether that principle applies in the instant case when the waiver of rights executed by the Petitioner plainly conflicts with the governing statutory requirements. Respondent fails to recognize that the Petitioner does not argue for the recission of a valid contract, but rather the lack of enforceability of an unlawful waiver which does not comply with the requirements of the OWBPA. See, e.g., *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, n. 12 (3rd Cir. 1997)

[2] Despite the fact that this case was dismissed below on Summary Judgment, following only limited discovery, Respondent spends a large portion of its brief (Resp. Br. 5, 9-10, 19, 48-50) on a factual issue that has never been pled, litigated, briefed or even discussed. Respondent's extraordinary claim that Ms. Oubre somehow engaged in a fraudulent scheme to bamboozle it out of the sum of $6,000.00 is based on a single question asked at a deposition to which an ambiguous answer was provided. As a disputed and highly speculative factual issue, on which the employer has the burden of proof, Respondent's allegation of fraud is disingenuous and wholly irrelevant to the question on which this Court granted certiorari.

Respondent's utilization of an equitable estoppel argument is equally

fallacy of the Respondent's argument with regard to ratification and that of its *amici* in this context is that they fail to address the straightforward language of the OWBPA. *Howlett v. Holiday Inns. Inc.* 1997 WL 450827 (6th Cir (Tenn.) Aug. 5, 1997) The statute does not authorize the defenses of ratification or tenderback. The third, sixth and seventh circuits have reached this conclusion. *Long v. Sears Roebuck & Co.,* 105 F.3d 1529 (3rd Cir 1997); *Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993), *cert. denied,* 511 U.S. 1108 (1994); and *Howlett v. Holiday Inns, Inc.* 1997 WL 450827 (6th Cir. (Tenn.) Aug. 5 1997). Arguably, the Eleventh Circuit is predisposed to this position as it has rejected a tender-back requirement for a pre-OWBPA waiver. *Forbus v. Sears, Roebuck & Co.,* 958 F.2d 1036 (11th Cir. 1992), *cert denied,* 513 U.S. 1113 (1995)

Respondent, relying upon support from the Fourth and Fifth Circuits, attempts to rationalize a disregard for Congress' clear mandate that an individual "may not waive" an ADEA claim absent a knowing and voluntry waiver of rights by evoking the common law doctrines of ratification and tender-back. *See, Blistein v. St. John's College,* 74 F 3d 1459, 1456-66 (4th Cir. 1996); *Blakeney v. Lomas Info. Sys., Inc.,* 65 F 3d 482, 485 (5th Cir., 1995), *cert. denied,* ____ U.S. ____, 116 S. Ct. 1042 (1996) Congress, however, has asserted

footnote 2 continued

curious given the undisputed fact that the Respondent initially induced the Petitioner to waive her rights without benefit of information, time, or other protective measures required by statute and has not attempted to date to amend the waiver to conform with the requirements of the OWBPA. "The doctrine [of equitable estoppel] has been repeatedly employed to estop a party from denying or avoiding the burdens of a transaction while retaining the benefits of the transaction." (Resp. Br. 17) This doctrine applies to Respondent who has avoided the burdens of complying with Federal law while reaping the benefits of no longer having the Petitioner on the company payroll.

regulatory control over the administration of waivers under the ADEA through the enactment of the OWBPA.[3] "Congress specified certain conditions that *must* be met in order for a waiver to be knowing and voluntary." *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1653 n.3 (1991)(emphasis added); *See also, Fleming v. United States Postal Service,* 27 D.3d 259, 261 (7th Cir. 1994) ("When Federal law limits a class of releases...the common law rule requiring tender as a prerequisite to recision may have to give way.")(citations omitted) When the requirements dictated by Congress are not met, the waiver is deemed unenforceable because it was not "knowing and voluntary."

The Respondent argues that an employee who received consideration under an invalid waiver must first tender back that consideration before proceeding to Court.[4] The Respondent once again turns to common law principles,

[3] As argued by AARP, common law principles are relied upon only when Congress has failed to expressly or impliedly evince any intention on the issue. (AARP Br. 4)(citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 110 (1991) Common law doctrine survives only when underlying principle is inconsistent with the Congressional intent expressed or implied in the statutes. *Id.* (citation omitted) Congress has clearly abrogated the common law principles of ratification and tender-back in enacting the OWBPA.

[4] Respondent argues that tender-back is mandated by equity to return the parties to *status quo* before the execution of the invalid waiver. In the present case, the facts are more involved than a simple return of monetary consideration. In order to return the parties to their respective positions prior to the execution of the waiver Entergy would have to once again give Ms. Oubre (and arguably all other individuals who were ranked 9 and presented similar waivers) the option of selecting to remain with the company. *See, Isaacs v. Caterpillar,* , 765 F. sup. 1359, 1367 (C.D. I11. 1991)

namely, recission in equity and at law. (Resp. Br. 12)[5] In the present case, Petitioner does not argue recission of a valid contract, but rather the unenforceability of a waiver due to its non-compliance with the OWBPA. It was Congress who dictated that non-compliance with the statute renders the waiver unenforceable.

Respondent attempts to frustrate a direct review of the issue before this Court by pontificating upon the distinction between a recision of a release and the invalidation of a waiver without first successfully arguing that the document at issue is anything but a waiver. As concisely articulated by Petitioner's *amicus curiae* "[a] waiver is not a contract....[i]t is a unilateral act with juridical significance: a knowing and voluntary renunciation of a legal right" as opposed to a release which signifies "an abandonment of a claim that might otherwise be enforced." (NELA Br. 7-9)(citations omitted)[6] The document executed by the Petitioner is a waiver of general undefined rights, not an abandonment of a known enforceable claim by the mutual consent of both parties spur-

[5] While Respondent's arguments of contractual recission are irrelevant to the issue before the Court, it appears that Respondent agrees with the premise put forth by *amicus curiae,* NELA, that under contract law the facts of the present case (as well as other anti-discrimination claims) warrant a recission in equity (which would not occur until the conclusion of the proceedings) and as such there is no need for pretrial tender. (NELA Br. 12-13) (citations omitted)

[6] Respondent's argument on the issue o f waiver versus release is hard to follow which is made evident by even the Respondent's inability to keep up with its convoluted logic. After spending several pages arguing that this case does not involve a "waiver", Respondent proceeds to define "the underlying transaction at issue" as "a waiver of legal rights" (at 27) and later in the brief, respondent again refers to the document as a waiver. (at 44)

red by risk aversion. *Cf., Fleming v. United States Postal Service*, 27 F.3d 259 (7th Cir. 1994) (Ms. Fleming entered into a settlement with her employer after suit was filed. She did not sign a waiver of undefined claims) As a waiver of ADEA rights, the requirements enumerated in the OWBPA must be present to effect a valid waiver.

Respondent urges that retention of the monetary consideration paid to Petitioner metamorphosed the invalid waiver into a valid contract subject to ratifiction.[7] Retention of monetary consideration given to the Petitioner as a condition of the waiver, however, does not make the waiver any more "knowing and voluntary" for the Petitioner as when she initially executed it. Respondent's argument is especially repugnant in light of the fact that it made no effort to comply with the Act at the time of drafting[8] nor subsequent to its execution. Accordingly, as recently stated by the Sixth Circuit '[I]t is clear from the statute that a former employee could no more assent to the waiver of his ADEA rights after having signed the defective release than he could at the time of signing it." *Howlett* 1997 WL 450827 at 3.

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[7] Tracking the argument made in *Wamsley* that the "new" promise under ratification is not subject to the waiver requirements of the OWBPA, neither the Respondent nor the Court in *Wamsley* offer justification for this exception. The "new" promise unconsciously made by the employee is still a waiver of ADEA rights, and thus is still invalid if the waiver does not comply with the OWBPA. *Howlett*, 1997 WL 450827 at 4.

[8] One can assume that Entergy Operations, Inc.-a vast utility company which operates five nuclear plants through out a tri-state area and which maintains a staff of "in-house" attorneys-was aware of the requirements of the OWBPA, eneactd in 1990, when the unlawful waiver in question was presented to the Petitioner for consideration in January 1995.

Not only does the concise language of the OWBPA negate the application of common law contractual principles, but so does the statutory structure of the statute and the legislative purpose behind its enactment. While the Respondent urges the Court to look to other aspects of the Act beyond the plain statutory language, it fails to persuade that common law doctrine should apply.[9] As conceded by the Respondent (Resp. Br. 22) "aspects of the OWBPA specify requirements not found in the common law rules" and far exceed the traditional grounds for contractual obligation avoidance such as duress, fraud, coercion or mistake. *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, 1539 (3rd Cir. 1997) Congress clearly abrogated the common law principal governing contractual obligations by codifying threshold requirements, which go beyond those found at common law, and which must be made a part of a waiver of rights under the ADEA to effect a knowing and voluntary waiver. The doctrine of ratification is "logically inconsistent with the specific terms of the OWBPA." (U.S. Br. 13, citing *Long*, 105 F 3d. at 1539 n. 17)

Further, the OWBPA alters the manner of enforcing a waiver of ADEA rights. The OWBPA places the onus of proving a knowing and voluntary waiver squarely on the employer. *Raczak v. Ameritech*, 103 F.3d 1257, 1262 (6th Cir. 1997) As pointed out by the brief submitted on behalf of the United States, Congress displaced ratification principles by imposing upon the party asserting the validity of the waiver the burden of proving the waiver is knowing and voluntary, 29 U.S.C. 626 (f) (3) This approach is contrary to the common law burden that requires the challenger proving a

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[9] "[A]ny conclusion that common law principles are not to be applied here must be drawn from other aspects of the OWBPA." (Resp. Br. 22)

waiver was not knowing and voluntary. (U.S. Br. 13)[10]

Finally, Respondent fails to address the fact that adoption of the doctrine of ratification would frustrate the purpose of the OWBPA and the ADEA.[11] The OWBPA was enacted on the heels of the EEOC abdicating its mandatory authority to supervise ADEA waivers due to lack of resources and against a backdrop that disfavored any waivers of ADEA claims. After rigorous debate, Congress authorized private execution of ADEA waivers only because of the statutory protection created by the OWBPA."The purpose of the OWBPA, to provide employees with sufficient information to evalute the worth of potential ADEA claims, would be frustrated in the very case [one in which the employer discriminates on the basis of age and intentionally withholds the information required by the OWBPA] in which the information is most important." *Howlett* 1997 WL 450827 at 4; see also *Raczak v. Ameritech Corp.*, 103 F. 3d 1257, 1262 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3001 (U.S. June 16, 1997) (No. 96-2002). Application of the ratification and tender-back doc-

[10] "This waiver approach has been fully observed by a majority of the circuits in Title VII and ADEA cases." (NELA Br. 9 n.3) (citing *Pierce v. Atchison, Topeka and Santa Fe Ry. Co.*, 65 F.3d 562 (7th Cir. 1995) (other citations omitted) (emphasis added)

[11] Contrary to the Respondents disingenuous plea that adherence to the requirements of the OWBPA would discourage out of court resolutions of ADEA claims in contradiction to the purpose of the act; corporations will continue to reduce their workforce due to economic pressures or investment strategies regardless of the outcome of this matter. The incentive to obtain a valid waiver of rights as a defense to litigation does not diminish if the employer is required to obey the law by providing the older worker with time and information to make a knowing and voluntary waiver of rights - the true purpose of the law.

trines would contravene the legislative purpose of the Act and the ADEA.[12] The OWBPA affords an older worker safeguards against employer intimidation and exploitation to waive ADEA rights without sufficient time or information to consider the consequences of her actions. Further, if an employee feels compelled to waive her rights due to financial exigency and lack of information, yet later learns she was the victum of age discrimination, she is in no better position financially (and arguably worse) to tender than when she executed the waiver.

The OWBPA provides the only incentive for the employer to comply with the act by creating a desire to secure a valid waiver of right to sue. To allow an employer, especially one who participates in discriminatory activities, to violate the law by non-compliance with the provisions of the OWBPA without deterrent would render the Act meaningless and void of all protective measures the Congress attempted to secure for older workers contemplating a waiver of rights under the ADEA. If tender back is required, than an incentive is created for the employer to ignore the law and gamble that an older worker will not be in a position to tender back consideration regardless how egregious an ADEA violation the employer may have committed. *Howlett*, 1994 WL 45082 F at 4. "The efficiency of its enforcement mechanisms becomes one measure of the success of the Act." *McKennon v. Nashville*

[12] The ADEA is designed not ony to address individual grievances, but also to further important societal polices. "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Pub. Co.*, 115 S.Ct. 879, 884 (1995)

Banner Pub. Co., 115 S.Ct. 879, 885 (1995)[13] It is obvious that application of the common law doctrines of ratification and tender back would thwart the purposes of the ADEA.

II. Rejection of Tender-Back Analysis in *Hogue v. Southern Ry. Co.* is Applicable to ADEA Cases

Respondent and the EEAC argue that Petitioner's reliance on *Hogue v. Southern Railway Co.* is erroneous and not dispositive of the case at bar. 390 U.S. 516 (1968). Each attempt to make a distinction between the purpose and enforceability of the FELA, the federal statue addressed in *Hogue*, and the ADEA.[14] This distinction, however, is not dispositive of the applicability of the holding in *Hogue*. What is significant is that the Court did not rest its ruling on the actions of the parties or the statutory language noted, but turned to the general policy and objectives of the FELA to reject a pretrial tender back requirment. *Hogue*, 390 U.S. at 518. This Court's holding in *Hogue*, that a tender requirement would deter meritorious challenges to release in FELA lawsuits, equally applies with full force to claims

[13] Respondent raises the spectre that if strictly interpreted the Act would mandate that a non-conforming release could not be enforced against the employer who wishes to renege on the deal struck with the older worker. The older worker would still have remedy at law by simply suing the employer for Age Discrimination—the right to which the employer attempted to procure a waiver.

[14] Respondent argues that "[C]ongress so completely took the injured railroad worker under its protection" as to provide such liberal remedy and recovery for injured workers that a pretrial tender would be an "empty formality". (Resp. Br. 38-40) As if to caution against such oversimplifying FELA recovery, this Court has stated "[t]hat FELA is to be liberally applied, however, does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis for his liability is his negligence, not the fact that injuries occur.' *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396, 2404 (1994) (citing *Ellis v. Union Pacific Rail Co.*, 329 U.S. 649, 653 (1947)

under the ADEA. *E.g., Forbus v. Sears, Roebuck & Co.*, 958 F. 2d 1036 (11th Cir. 1992).

By enacting the OWBPA Congress specifically took "under its protection" older workers who were confronted with a waiver of rights in exchange for departure from gainful employment and monetary consideration offered by the employer who enjoys a superior bargaining position to that of the older worker. To require a pre-suit tender back of consideration received would be wholly incongruous to the general policy of the OWBPA-to afford protection to older workers injured by unlawful age discrimination and acts as a deterrent to employers from engaging in discriminatory behavior. See, *Long*, 105 F. 3d at 1529, See also, *Robinson v. Shell Oil Co.* 117 S.Ct. 843, 848 (1997). (interpretng anti retaliation provisions of Title VII, Court looks to "primary purpose" of the statute.

III. Compliance with the OWBPA is a Defense to Protracted Litigation

Respondent and its *amici* plead that allowing an older worker to retain consideration paid pursuant to a waiver of rights and proceed with a suit for age discrimination is inherently unfair. This argument, however, is not supported by an examination of the purpose of the Act. The requirements enumerated at 29 U.S.C. § 626 (f) were specifically designed to protect employees negotiating with employers. *Long*, 105 F.3d at 1543 Each requirement provides the employee information and time to consider the proposed

waiver of rights.[15] The Act clearly places the burden on the employer to defend a waiver it drafted to entice an older worker to leave its employ. To require a tender-back would impermissibly shift that burden.

The "equity" Respondent seeks would occur in the remedial phase of a trial when a defense for set-off to damages can be raised by the employer for the monies paid under the invalid waiver.[16] *Hogue* 390 U.S. at 518.

Contrary to Respondent's assertion that the law is difficult to follow, especially given the facts of this case where the Respondent made no attempt to comply with the law, the only requirement which can be deemed ambiguous is the requirement for providing job title and classification information. 29 U.S.C. §626 (f) (1) (H)[17] Although cases of statutory

[15] The EEAC clouds the issue of compliance by asserting that Congress intended to allow employees to forego the Act's specific requirements by signing a waiver before the expiration of the full time period required. (EEAC Br. 22) Nothing in the Act prohibits an employee from making a knowing and voluntary waiver in shorter than 21 days (or 45 days as the facts may warrant), but the Act does prohibit an employer from offering less than the maximum time allowed by the statute.

[16] The ISCC raises the issue that if a plaintiff loses on the merit of an Age Discrimination case, there will be no award from which to detract monies paid in consideration for the waiver, thus placing an employer who does not discriminate in a less favorable position than one who does. (ISCC Br. 12) The ISCC, as does the Respondent, ignores the fact that if an employer complies with the Act they have a valid defense to suit. Non-compliance with the act in the ISCC's scenario would expose the employer to loss of the consideration paid for the invalid waiver. This is a just and equitable interpretation since it is the employer who drafts the waiver and is in a far better position to protect its interests than an older worker.

[17] In fact, in the seven years since its enactment only two reported decisions have addressed this portion of the Act. *Raczak* 103 F. 3d at 1262.

interpretation regarding this provision may arise, this has little or nothing to do, as Respondent asserts, with whether tender-back should be required.[18] The statutory ambiguity is a distinct issue; it will arise regardless of whether individuals offer to tender-back their consideration, and no statutory clarity is gained by requiring a tender-back. A waiver, even one validly drafted, gives no guarantee that a suit will not be filed; it simply is a defense against a suit once filed. *Isaacs v. Caterpillar,* 702 F. Supp 711, 715 (C.D.Ill. 1988)

When provided with the information required by OWBPA, the older worker's decision to waive her rights does not necessarily become less difficult, but rather, presumably knowing and voluntary.

[18] When faced with this issue in *Raczak v. Ameritech*, the court reached a reasonable conclusion with respect to the employer's compliance, remanding the case to the District court for a determination on the issue. 103 F.3d 1257,1264 (6th Cir. 1997)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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(6)

No. 96-1291

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOLORES OUBRE, PETITIONER

v.

ENTERGY OPERATIONS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner's failure to tender back severance payments to her employer constitutes ratification of a waiver of claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, notwithstanding the fact that under the ADEA, as amended by the Older Workers Benefits Protection Act (OWBPA), 29 U.S.C. 626(f), any waiver must be knowing and voluntary, and must satisfy specifically enumerated statutory prerequisites that were not met by the waiver in this case.

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INTERESTS OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case arises out of an action brought by an employee under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, alleging that she was constructively discharged on account of her age. The court of appeals summarily affirmed the district court's ruling that petitioner's claim under the ADEA is barred. The lower courts' rulings were based on circuit precedent holding that, although a release of claims executed by an employee does not, by itself, constitute a knowing and voluntary

waiver of claims within the meaning of the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f), an employee's ADEA claim is nonetheless waived if the employee retains severance payments that were made in conjunction with the release. In the view of the courts below, retention of severance benefits ratifies an earlier, otherwise invalid, ADEA release and is not subject to the requirements of the OWBPA. The court of appeals' ruling thereby substantially affects the statutory scheme fashioned by Congress to govern older workers' rights under the ADEA.

The Equal Employment Opportunity Commission (EEOC) has a strong interest in ensuring that the ADEA and the OWBPA are correctly interpreted to serve their intended purposes. The EEOC has primary responsibility for administering and enforcing the ADEA and has an interest in the effectiveness of the entire congressional plan for eradicating age discrimination, including private actions by employees that further the purposes of the ADEA. The Court has recognized that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA." *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995). Ensuring that private litigants retain their full rights under the OWBPA to pursue ADEA claims thus furthers the mission of the EEOC to enforce the ADEA.

The ADEA's prohibition against discrimination on the basis of age extends to federal agencies. 29 U.S.C. 633a. Thus, the United States, as an employer, is bound by the OWBPA's provisions regarding waivers under the ADEA.

STATEMENT

1. The ADEA makes it unlawful, *inter alia*, for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;" or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2).

In 1990 Congress amended the ADEA by enacting the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978. Title II of the OWBPA (§ 201, 104 Stat. 983) added a new subsection (f) to Section 7 of the ADEA, 29 U.S.C. 626(f), which now provides, in relevant part, that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. 626(f)(1). Section 7(f)(1) further mandates that "a waiver may not be considered knowing and voluntary unless at a minimum," the following specific requirements are met: the waiver must be part of an agreement written in a manner calculated to be understood by the average individual (29 U.S.C. 626(f)(1)(A)); the waiver must "specifically refer[] to rights or claims arising under [the ADEA]" (29 U.S.C. 626(f)(1)(B)); the waiver cannot cover rights or claims that may arise after the date the waiver is executed (29 U.S.C. 626(f)(1)(C)); in exchange for the waiver, the employee must receive consideration in addition to that which he or she is already entitled (29 U.S.C. 626(f)(1)(D)); the employee must be advised in writing to consult with an attorney before executing the agreement (29 U.S.C. 626(f)(1)(E)); the employee must be given 21 days within which to consider the

agreement (or 45 days if the waiver is in connection with a termination program offered to a group of employees) (29 U.S.C. 626(f)(1)(F)(i) and (ii)); the agreement must provide that the employee can revoke the agreement within seven days after its execution and that the agreement shall not become effective or enforceable until after that period (29 U.S.C. 626(f)(1)(G)); and, if the waiver is in connection with a termination program offered to a group of employees, the employer must (at the commencement of the 45-day period required under 29 U.S.C. 626(f)(1)(F)) inform the employee in writing of certain information about all the persons covered by the program (including their ages) (29 U.S.C. 626(f)(1)(H)(i) and (ii)).

Section 7(f)(2) of the ADEA (also added by the OWBPA) specifies that the only exception to the Section 7(f)(1) prerequisites for a knowing and voluntary waiver of an ADEA claim is a waiver that is "in settlement of a charge filed with the [EEOC], or an action filed in court by the individual or the individual's representative," alleging age discrimination under Sections 4 or 15 of the ADEA. 29 U.S.C. 626(f) (2). In such instances, a waiver "may not be considered knowing and voluntary unless at a minimum," the first five requirements of Section 7(f)(1) are met (*i.e.*, 29 U.S.C. 626(f)(1)(A) through (E)), and the employee is given a reasonable period of time within which to consider the settlement agreement. 29 U.S.C. 626(f)(2)(A) and (B). In any dispute regarding whether the statutory minimum requirements have been met, "the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)" of Section 7(f). 29 U.S.C. 626(f)(3).

2. a. Petitioner, Dolores Oubre, was employed by respondent, Entergy Operations, Inc., from 1987 until

the beginning of 1995. Resp. C.A. Br. 6-8. In the fall of 1994, respondent implemented a new employee evaluation process that annually ranked its salaried employees in one of nine groups. Br. in Opp. 2. On January 17, 1995, petitioner's supervisors notified her that she had been ranked in the lowest group. J.A. A18; Resp. C.A. Br. 7-8. They informed her that she had the option either to resign and receive a severance package, or to continue employment pursuant to an action plan that would be developed for her. Br. in Opp. 2. All employees ranked in the lowest group were offered the same option. J.A. A17-A18.[1]

At the January 17 meeting, petitioner was provided a letter that set forth the terms of the severance package offered by respondent. J.A. A18; C.A. E.R. 1-2. Attached to the letter was a release of claims petitioner was required to sign in order to receive the severance benefits. C.A. E.R. 4. Neither the letter nor the release specifically referred to claims or rights arising under the ADEA, as required under 29 U.S.C. 626(f)(1)(B).[2] The letter notified petitioner that she was required to sign the release and return

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[1] Petitioner asserts (Pet. 2, 12) that respondent's program mandated that ten percent of its employees be ranked in the lowest group. Petitioner also contends (Pet. 2-4) that persons ranked in the lowest group were informed that if they were ranked in the lowest group the following year as well, they would be subject to termination without any severance pay. And, petitioner alleges (Pet. 3-4) she was told by supervisors that, although an action plan would be developed for her during that following year, it would be virtually impossible for her to move out of the lowest-ranked group even if she met all the goals of the plan.

[2] The release, nonetheless, purported to apply to all claims, occurring on or before the date of the execution of the release "which in any way relate to" petitioner's "employment" with, or "separation" from, respondent. C.A. E.R. 4.

it no later than February 1, 1995, or the severance benefits would no longer be available to her. *Id.* at 2. Thus, petitioner was not afforded the 45-day period in which to consider the waiver, as required under 29 U.S.C. 626(f)(1)(F)(ii), in connection with a group termination program (or even the 21-day period required in connection with an individual employee termination, see 29 U.S.C. 626(f)(1)(F)(i)). Neither the letter nor the release provided petitioner with information about the other employees covered by the same employee termination program, as required under 29 U.S.C. 626(f)(1)(H). And neither the letter nor the release provided that petitioner could revoke the release during the seven-day period following its execution or that the agreement would not become effective or enforceable until such period had expired, as required under 29 U.S.C. 626(f)(1)(G).

On January 31, 1995, petitioner informed respondent that she would accept the severance package, and she signed the release. J.A. A18. Respondent then made the severance payments under the terms of the agreement. J.A. A19.[3]

b. In September 1995 petitioner filed suit in the United States District Court for the Eastern District of Louisiana, alleging that respondent constructively discharged her on account of her age, in violation of the ADEA, 29 U.S.C. 621 *et seq.*, and various state laws. Pet. 2; Br. in Opp. 3. Respondent filed a motion for summary judgment, contending that petitioner had waived her right to bring an action under the ADEA by virtue of having signed the release and having failed to return the severance payments she had received. J.A. A19; Pet. 5. Petitioner opposed the

[3] Petitioner received one month of administrative leave, then one month of base pay plus one week of pay for each year of accredited service; the cash amount paid to her totalled $6,258.62. Resp. C.A. Br. 10-11 & n.4.; Pet. 16; C.A. E.R. 1.

motion, contending that the release did not constitute a knowing and voluntary waiver of her ADEA claim because the release did not comply with the OWBPA and because she was under economic duress at the time she accepted the severance package. Br. in Opp. 3.

The district court entered summary judgment for respondent. J.A. A17-A21. The court found that it was "undisputed that the release signed by [petitioner] did not meet some of [the OWBPA's] criteria, including the requirements that specific reference to ADEA rights be made, that a waiting period of at least 45 days within which to consider the agreement be given and that a seven day period following execution to revoke the agreement be provided." J.A. A20 (citing 29 U.S.C. 626(f)(1)(B) and (F), and (G)). The court noted, however, that the Fifth Circuit previously had held that "the failure to meet the requirements of subsections (A) through (H) of the OWPA does not render the agreement void of legal effect even though not 'knowing and voluntary.' Rather, such waivers are only subject to being avoided at the employee's option." *Ibid.* (quoting in part *Wamsley* v. *Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), cert. denied, 115 S. Ct. 1403 (1995)). The court reasoned that, "[a]ccording to *Wamsley*, where the employee chooses to retain and not tender back the benefits paid in consideration for the agreement, she manifests an intention to be bound by the waiver and makes a new promise to abide by its terms." *Ibid.* (citing *Wamsley*, 11 F.3d at 540, and *Blakeney* v. *Lomas Info. Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996)). Concluding that it was "not at liberty to disregard the law announced by the Fifth Circuit," the district court dismissed petitioner's complaint with prejudice. *Ibid.*

3. The court of appeals summarily affirmed. J.A. A22-A23. Stating that it had reviewed the record and the parties' briefs and had found no reversible error, the court of appeals affirmed "for the reasons enunciated by the district court." J.A. 23.

4. Petitioner then filed a petition for a writ of certiorari presenting three questions. On April 27, 1997, the Court granted review limited to the third question presented—"[w]hether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the release binding." 117 S. Ct. 1466; Pet. i.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that an employee is barred from pursuing a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, by virtue of the fact that the employee retains severance payments made in conjunction with a release of claims that does not constitute a knowing and voluntary waiver of ADEA claims under the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f). Section 7(f)(1) of the ADEA, as added by the OWBPA, unequivocally states (1) that an individual "may not waive" any claim under the ADEA unless the waiver is knowing and voluntary and (2) that, in order to be considered knowing and voluntary, a waiver of an ADEA claim must satisfy detailed statutory prerequisites. There is no statutory exception from the Section 7(f)(1) prerequisites for cases in which a person retains severance payments made under a waiver that was not knowing and voluntary.

The plain language and structure of the OWBPA are clear on this point. The common law doctrine of contractual ratification cannot be applied to override

the OWBPA's explicit restriction on the waivability of ADEA claims. The history and circumstances surrounding enactment of the OWBPA also demonstrate that Congress did not intend a ratification exception to the OWBPA's waiver prerequisites.

An employee need not tender back severance payments he or she received in conjunction with a purported ADEA waiver prior to pursuing an action under the ADEA. As this Court ruled with respect to an analogous statute in *Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968), a tender back requirement would be inconsistent with the purposes of the ADEA.

ARGUMENT

AN EMPLOYEE DOES NOT WAIVE A CLAIM UNDER THE ADEA BY EXECUTION OF A RELEASE OF CLAIMS AND RETENTION OF SEVERANCE PAYMENTS MADE THEREUNDER, IF THE RELEASE DOES NOT CONFORM TO THE STATUTORY PREREQUISITES FOR A KNOWING AND VOLUNTARY WAIVER OF ADEA CLAIMS UNDER THE OWBPA

There is no question that the release drafted by respondent and signed by petitioner did not include certain terms that are mandated by Section 7 of the ADEA, 29 U.S.C. 626, as added by the OWBPA, to support a knowing and voluntary waiver of claims under the ADEA. See pp. 3-4, 7, *supra*.[4] It is clear from the statutory text, structure, and history of the OWBPA, and from this Court's precedents, that a

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[4] There is a dispute, however, regarding whether the release met certain other of the statutory prerequisites, *e.g.*, whether petitioner received consideration to which she was not already entitled. See Pet. 16-17, 19, 23-24; Br. in Opp. 13-14. The courts below did not resolve that issue, and this Court limited its grant of review to the ratification issue.

release that does not meet the requirements of the OWBPA does not constitute a knowing and voluntary waiver of ADEA claims. An employee can pursue an ADEA action in such circumstances, regardless of the retention of severance benefits.

A. The Text and Structure of the OWBPA Establish That, Absent a Waiver That Meets the OWBPA's Prerequisites, Waiver of a Right or Claim Under the ADEA Cannot Occur

1. Section 7(f)(1) of the ADEA, as added by the OWBPA, unequivocally states that an individual "may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. 626(f)(1). Section 7(f) does not leave the term "knowing and voluntary" undefined. It specifically prohibits a waiver from being considered "knowing and voluntary" unless, "at a minimum," the requirements listed in Section 7(f)(1)(A) through (H) are met. The unassailable corollary is that an individual may not waive any claim or right under the ADEA unless the requirements listed in Sections 7(f)(1)(A) through (H) are met.

Under the approach adopted by the courts below, however, employees waive their rights and claims under the ADEA, even absent satisfaction of the statutory requirements, if the employees retain severance payments. The OWBPA, however, permits no such exception to the "knowing and voluntary" waiver prerequisites imposed under Section 7(f)(1).[5] The language and structure of the OWBPA "plainly restrict[] an employee's freedom to waive his rights or claims under the ADEA." *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), cert. denied, 511 U.S. 1108 (1994). "[A]fter grappling with the question of whether to permit ADEA waivers at all," Congress enacted the OWBPA prerequisites and stated "unequivocally that unless the enumerated requirements are met, an individual '*may not waive*' ADEA rights." *Long* v. *Sears Roebuck & Co.*, 105 F.3d 1529, 1539 (3d Cir. 1997).

[5] The only exception to Section 7(f)(1)—set forth in Section 7(f)(2)—applies to cases that involve settlement of a charge that already has been filed with the EEOC or of a case that already has been filed in court (and even then the exception only modifies slightly the prerequisites for a knowing and voluntary waiver). That exception is inapplicable here.

The fact that Congress created only a single exception to the Section 7(f)(1) prerequisites, *i.e.*, for cases pending before the EEOC or in court (29 U.S.C. 626(f)(2)), further reinforces the OWBPA's mandate. Structuring the statute first to list the threshold requirements for a valid ADEA waiver, followed by a single exception, demonstrates that Congress did not intend any other exceptions.

2. Disregard for the OWBPA's clear mandate—that an individual "may not waive" an ADEA claim absent a knowing and voluntary waiver—has been rationalized by the Fifth Circuit under the common law doctrine of contract ratification. The courts below followed Fifth Circuit authority that enactment of the OWBPA in 1990 did not disturb earlier precedent that an employee's retention of severance benefits ratifies an ADEA release. J.A. A20 (citing *Wamsley* v. *Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 536, 540-542 (5th Cir. 1993), cert. denied, 115 S. Ct. 1403 (1995) (applying *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991))). In *Wamsley*, the Fifth Circuit reasoned that: the common law doctrine of contractual ratification of voidable contracts applies to ADEA waivers notwithstanding enactment of the OWBPA; a release that does not constitute a knowing and voluntary waiver under the OWBPA is not void, but is merely voidable; an employee's reten-

tion of severance payments constitutes a choice not to avoid an invalid release and thereby serves as a ratification which is a new promise not subject to the waiver requirements of the OWBPA; and applying the common law doctrine of tender back to preclude an ADEA suit unless an employee returns all severance payments is consistent with the purposes of the ADEA. *Id.* at 538-542; see also *Blakeney* v. *Lomas Info. Sys., Inc.*, 65 F.3d 482, 484-485 (5th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996); *Wittorf* v. *Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994).[6]

a. The conclusion that an individual may waive ADEA claims through ratification of an invalid waiver flies in the face of the OWBPA's mandate that an individual "may not waive" any ADEA claim unless pursuant to a knowing and voluntary waiver. Regardless of the applicability of the ratification doctrine to ADEA releases in pre-OWBPA cases, "the enactment of the OWBPA changed the legal landscape with respect to the release of ADEA claims. In light of the [OWBPA], * * * the ratification doctrine does

[6] The Fourth Circuit also has applied the contractual ratification theory underlying its pre-OWBPA precedent to an ADEA case that postdates the OWBPA. *Blistein* v. *St. John's College*, 74 F.3d 1459, 1465 (4th Cir. 1996) (applying *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991)). In *Blistein*, the Fourth Circuit explained that, prior to enactment of the OWBPA, the circuits were split "over how to determine whether an ADEA claim had been validly released"—"[s]everal circuits had adopted a federal common law 'totality of the circumstances' test," while other courts, including the Fourth Circuit in *O'Shea*, "had resorted to ordinary state law contract principles in resolving the question," and it concluded that the OWBPA codified the totality-of-circumstances test. 74 F.3d at 1465. The Third Circuit has recognized—correctly, in our view—that the OWBPA supplants both of the pre-OWBPA tests. *Long*, 105 F.3d at 1538 & nn. 14, 15.

not apply to ADEA releases which fail to comply with the OWBPA." *Long*, 105 F.3d at 1534.

In addition to the plain language of the OWBPA's prohibition on noncomplying waivers, the overall structure of the OWBPA makes clear that application of the common law ratification doctrine to ADEA releases would conflict with that scheme. The prerequisites enacted go well beyond common law principles and require a higher threshold of protection for waivers of ADEA claims. As a structural matter, the OWBPA alters the manner of enforcing an ADEA waiver. Whereas under common law an employee challenging a waiver bore the burden of establishing that a waiver was not knowing and voluntary, the OWBPA imposes on the party asserting the validity of the waiver the burden of proving that the waiver is knowing and voluntary. See *Long*, 105 F.3d at 1539 (citing 29 U.S.C. 626(f)(3)). That approach evidences an intent on the part of Congress to place the risk of nonpersuasion on an employer who is seeking to enforce a waiver, in contrast to ratification which holds an employee to an obligation that an employer could not have enforced.

The specific OWBPA prerequisites to a knowing and voluntary waiver also reflect a displacement of the ratification doctrine. That doctrine simply "is logically inconsistent with the specific terms of the OWBPA." *Long*, 105 F.3d at 1539 n.17. "To conclude otherwise would be to say that Congress only intended that the OWBPA requirements apply to the 'first' waiver." *Id.* at 1539-1540. Indeed, permitting common law ratification would permit an employer to do an end run around the entire statutory scheme.

Thus, the common law doctrine of ratification simply cannot be invoked in disregard of the detailed statutory framework of the OWBPA. Common law principles are "not to be applied in defiance of a stat-

ute's overriding purposes and logic." *United States* v. *Locke*, 471 U.S. 84, 98 (1985). Here, application of the common law ratification doctrine is precluded because it would be incompatible with the statutory scheme of the OWBPA. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991) (refusing to apply common law doctrine of collateral estoppel to state administrative findings in ADEA case inconsistent with congressional intent underlying ADEA).

b. Permitting application of the ratification doctrine to ADEA waivers that do not comply with the OWBPA also is inappropriate because noncomplying waivers are void, not merely voidable. "The propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised." Restatement (Second) of Contracts § 7, cmt. e (1981). The OWBPA states, however, that an ADEA waiver "shall not become effective or enforceable until" after expiration of the seven-day revocation period following execution of the agreement. 29 U.S.C. 626(f)(1)(G). Thus, an ADEA waiver that does not comply with the OWBPA is not valid and does not have "its usual legal consequences" that a party must choose to avoid. In order to have any legal consequences, an ADEA waiver must meet the OWBPA prerequisites, including surviving a seven-day period during which the employee is afforded the right to revoke it. Absent such circumstances, any purported release of ADEA claims is without legal effect. See *Oberg*, 11 F.3d at 685 (ADEA waiver that does not meet OWBPA prerequisites is "dead by force of law").[7] As such, ratification cannot

[7] The Third Circuit has reasoned that whether noncomplying ADEA waivers are void or voidable is not relevant because, under either characterization, a court still must decide whether an employee's retention of severance benefits should

occur because "[v]oid promises are not legally binding and thus, are not contracts." *Wamsley*, 11 F.3d at 539 (citing Restatement (Second) of Contracts § 7, cmt. a (1981)).[8]

Moreover, it is far from clear that an employee like petitioner has a "power of avoidance." See Restatement (Second) of Contracts § 7 (1981) (in order to constitute voidable contract subject to ratification, party must have power to avoid legal relations created by contract). The Fifth Circuit's assertion that a noncomplying ADEA waiver is "subject to being avoided at the election of the employee," *Wamsley*, 11 F.3d at 539, cannot be reconciled with the OWBPA's plain statement that "[a]n individual *may not* waive any right or claim under [the ADEA]" unless the waiver complies with the OWBPA's prerequisites. 29 U.S.C. 626(f)(1) (emphasis added). The OWBPA simply does not permit an employee to elect whether to avoid an ADEA waiver that does not comply with the OWBPA.[9]

bar his or her ADEA claim or whether tender back is required. *Long*, 105 F.3d at 1537. District courts have taken differing approaches, but a majority of those outside of the Fourth, Fifth and Seventh Circuits have adopted the *Oberg* analysis. *Id.* at 1536 n.12 (citing cases).

[8] Contrary to the Fifth Circuit's assertion (see *Wamsley*, 11 F.3d at 539 n.8), Congress' failure to use the term "void" is of no consequence. Providing that an agreement is not effective or enforceable renders the agreement void. And waiver agreements may be deemed void where the relevant statute does not label such agreements "void." *Brooklyn Savs. Bank* v. *O'Neil*, 324 U.S. 697, 710-713 (1945) (absence of statutory language prohibiting waiver of rights under Fair Labor Standards Act does not preclude finding that such waivers are "void as contrary to public policy").

[9] The Fifth Circuit has suggested that, if noncompliance with the provisions of Section 7(f)(1) renders an ADEA release

c. In any event, even if an ADEA waiver that does not comply with the OWBPA could be characterized as merely "voidable," and even if the applicability of the ratification doctrine to ADEA waivers survived enactment of the OWBPA, the Fifth Circuit's approach would still be unsound. There is no support for its conclusion that ADEA claims can be waived through ratification that does not comply with the OWBPA. The Fifth Circuit merely declared, without citation, that an employee's ratification constitutes a new promise and "[a]s a new promise that creates a new obligation, it is not subject to the waiver requirements of § 626, and thus, such requirements

void, there would be no need for Section 7(f)(1)(G) of the ADEA, 29 U.S.C. 626(f)(1)(G). See *Wamsley*, 11 F.3d at 539. The Fifth Circuit misreads Section 7(f)(1)(G). As explained above, Section 7(f)(1)(G) requires that an ADEA waiver provide the employee with a seven-day period in which he or she is entitled to revoke the agreement, and it provides that the release does not become effective or enforceable until after expiration of that revocation period. Contrary to the premise underlying the Fifth Circuit's interpretation, Section 7(f)(1)(G) does not serve as a safeguard against releases that do not comply with the other provisions of Section 7(f)(1). Section 7(f)(1)(G) does not apply to such noncomplying releases. It does not grant an employee the authority to void a non-complying release because such noncomplying releases already are void. Rather, Section 7(f)(1)(G) applies to agreements that *are* in compliance with all the OWBPA prerequisites and that otherwise meet the statutory threshold for knowing and voluntary ADEA waivers. It permits the employee a short period within which to revoke such an agreement prior to its effective date, for any reason or for no reason, *e.g.*, an employee may change his or her mind based on the other employees who execute the agreement, or he may simply suffer from signer's remorse, quickly changing his mind about the wisdom of the release after he signs it. See *Soliman* v. *Digital Equip. Corp.*, 869 F. Supp. 65, 69 n.14 (D. Mass. 1994).

pose no bar to its enforcement." *Wamsley*, 11 F.3d at 540 n.11.

The Fifth Circuit has acknowledged, however, that "if the same grounds for avoidance exist when the new promise is made, the party again enjoys the power to avoid performance under the new promise." *Wamsley*, 11 F.3d at 539 n.7. It cites the Restatement's discussion of the common law doctrine that, under the ratification doctrine, the "new promise may itself be voidable for the same reason as the original promise, or it may be voidable or unenforceable for some other reason." See Restatement (Second) of Contracts § 85 cmt. b (1981). The Restatement goes on to explain, by way of example, that some States require that in order for a new promise of a former infant to constitute ratification of a promise that was otherwise voidable because entered into while the person was still an infant, the new promise must be in writing and signed. *Ibid.* Similarly, the OWBPA's dictate that an individual "may not waive" an ADEA claim unless the OWBPA's prerequisites are met, applies whether the purported waiver is accomplished by signing a release, or by ratification. Thus, any new promise made through ratification is also subject to the OWBPA.

B. The History Surrounding Enactment of the OWBPA Demonstrates That Congress Did Not Intend Any Ratification Exception To the OWBPA's Waiver Prerequisites

The intent reflected in the OWBPA's clear language, mandating compliance with the statutory prerequisites and not admitting of exceptions therefrom for ratification, is evident from the legislative record.

1. The Senate Report makes clear that a waiver that does not meet the OWBPA's prerequisites is void, of no legal effect. Thus, the OWBPA "provides for the first time by statute that waivers not super-

vised by the EEOC *may be valid and enforceable if* they meet certain threshold requirements and are otherwise shown to be knowing and voluntary." S. Rep. No. 263, 101st Cong. 2d Sess. 31 (1990) (S. Rep. No. 263) (emphasis added). The Senate Report stresses that all statutory prerequisites must be met, regardless of other "knowing and voluntary" considerations. *Id.* at 32. Moreover, it specifies that, because permitting ADEA waivers that were not supervised by the EEOC was a substantial change from past law, the Senate Committee intended "that the requirements * * * be *strictly* interpreted *to protect those individuals covered by the Act.*" *Id.* at 31. (emphasis added).[10]

2. The intent to protect older workers and to ensure that their ADEA claims were not subject to waiver, absent compliance with the statutory prerequisites, could not be clearer from the legislative record. The Senate Report unequivocally states that the OWBPA was intended to "ensure[] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." S. Rep. No. 263 at 5. It specified that the statutory prerequisites to a valid ADEA waiver were included "with the intent of according basic due process protections to employees who are asked to execute waivers." *Id.* at

[10] The legislative record demonstrates that Congress intended the OWBPA to "limit waivers to certain situations and then spell[ed] out clear and ascertainable standards to govern those situations." H.R. Rep. No. 664, 101st Cong., 2d Sess. 27 (1990). That approach was intended to "clarify an unsettled area of the law" and eliminate the litigation that had arisen regarding ADEA releases based on the many different factors and criteria applied in the former case-by-case approaches under the totality-of-the-circumstances test and the state-contract-law test. *Ibid*; see also S. Rep. No. 79, 101st Cong., 1st Sess. 17 (1989); see note 6, *supra*.

32. The circumstances surrounding the enactment of the OWBPA reveal that there was no intent to permit disregard for the restrictions on ADEA waivers through ratification of waivers that failed to afford employees the statutory protections. The OWBPA was enacted against a backdrop that disfavored any waivers of ADEA claims and that led to authorization for certain waivers only because of the statutory protections created.

Prior to enactment of the OWBPA, the EEOC had promulgated a regulation that permitted waivers of ADEA claims without supervision by the EEOC so long as the waivers were "knowing and voluntary." 52 Fed. Reg. 32,293 (1987); 29 C.F.R. 1627.16(c) (1987). The regulation identified factors relevant to the determination whether a waiver is "knowing and voluntary," but the only mandatory requirements were that it not apply to prospective rights or claims and that it not be in consideration for benefits to which the employee was already entitled. *Ibid.*[11]

Almost immediately thereafter, Congress expressed concern about permitting any waivers of ADEA claims and suggested that the EEOC's "rule was without legal foundation and contrary to public policy." H.R. Rep. No. 664, 101st Cong., 2d Sess. 20 (1990) (H.R. Rep. No. 664). Congress suspended operation of the EEOC regulation for fiscal year 1988 and the following two years. See 133 Cong. Rec. H12,392 (daily ed. Dec. 21, 1987); 134 Cong. Rec. H8297 (daily ed. Sept. 26, 1988); 135 Cong. Rec. H7618 (daily ed. Oct. 26, 1989). Notwithstanding Congress's suspension of the regulation, however, some lower courts

[11] The OWBPA ultimately rendered the EEOC's rule, permitting unsupervised waivers without the protections of the OWBPA, of no force or effect. Pub. L. No. 101-433, § 202(b), 104 Stat. 984 (1990).

ruled that releases were permitted under the ADEA in certain circumstances. H.R. Rep. No. 664 at 21-22.

In 1990, a legislative proposal in the House of Representatives was introduced, similar to one introduced the preceding year, that would have permitted ADEA waivers, but only where the employee already had made a claim under the ADEA—and therefore was fully aware of the rights he or she was waiving. See H.R. Rep. No. 664 at 5, 7, 49-50. Even in such instances, a waiver would have been recognized only if it had been knowing and voluntary and had met certain prerequisites similar to those currently contained in the OWBPA. *Id.* at 5. The House proposal would have prohibited altogether waivers of ADEA claims as part of individual early retirement or early group incentive programs, such as the separation program at issue in this case. *Id.* at 7, 52-54. The House Report explained that older workers can be unfairly forced to waive their ADEA rights, especially in "large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force." *Id.* at 22-23.

That House bill eventually gave way to a Senate bill passed later that year. 136 Cong. Rec. S13,611 (daily ed. Sept. 24, 1990); 136 Cong. Rec. H8738 (daily ed. Oct. 3, 1990). The Senate bill permitted ADEA waivers in circumstances not supervised by the EEOC or courts, but the Senate Report emphasizes that, in lieu of supervision, the significant statutory requirements must be met. See S. Rep. No. 263 at 31.[12]

[12] Although the Senate bill was amended in certain limited respects subsequent to the completion of the Senate Report (see, *e.g.* 136 Cong. Rec. S13,607 (daily ed. Sept. 24, 1990)), the provisions relevant in the instant case were not altered.

The Senate bill also permitted waivers in conjunction with early retirement or early group incentive programs, such as the program at issue in this case. It imposed additional requirements in such circumstances, however, regarding the information that must be provided by the employer to support a valid waiver. S. Rep. No. 263 at 6. The Senate Report notes the special issues that arise in the context of group termination and reduction programs, and emphasizes that, in such instances, "the need for adequate information and access to advice before waivers are signed is especially acute." *Id.* at 32. As opposed to individual separation agreements, the terms of group programs generally are not subject to negotiation between the parties and the affected employees who are unlikely to have a reason to suspect that the action is based on their individual characteristics. *Ibid.* The Senate Report explains that

> [t]he principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

Id. at 34.

Application of the ratification doctrine to ADEA waivers that do not comport with the OWBPA's statutory prerequisites would contravene this intended congressional design. An employee who signs a purported ADEA waiver that does not afford him the protections intended by Congress under the OWBPA would, nonetheless, be bound by that otherwise invalid waiver if the employee decided to keep the severance benefits paid to him. But the fact that an employee,

such as petitioner, retains benefits paid as part of a group termination program, does not establish that the employee has obtained any of the information about the other employees covered by the program as mandated by the OWBPA or that any other protections of the OWBPA have been afforded the employee.

3. The legislative history of the OWBPA contains no reference to the doctrine of contractual ratification or to case law that invokes that doctrine. *Long*, 105 F.3d at 1539 n.17. Apparently, at the time the OWBPA was enacted, no court of appeals had held that an ADEA waiver that was not knowing and voluntary could be ratified through the retention of severance benefits.[13] Moreover, the caselaw relating to

[13] By the time of the enactment of the OWBPA, three reported district courts had discussed the ratification theory in the context of a purported waiver of ADEA rights, although in each instance the court relied on that approach as an alternative theory. See *Constant* v. *Continental Tel. Co.*, 745 F. Supp. 1374 (C.D. Ill. 1990); *O'Shea* v. *Commercial Credit Corp.*, 734 F. Supp. 218 (D. Md. 1990), aff'd, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991); *Widener* v. *Arco Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989). The determinations by the Fourth and Fifth Circuits that retention of severance benefits ratifies an ADEA waiver that is not otherwise knowing and voluntary, postdated enactment of the OWBPA, although both determinations were initially announced in cases to which the OWBPA did not apply because the release predated its enactment. See *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). The Eleventh Circuit also addressed the issue in an opinion that followed enactment of the OWBPA and which did not apply the OWBPA because the release predated its enactment, but it reached a result contrary to the Fourth and Fifth Circuit, disagreeing with the ratification analysis of *O'Shea* and *Grillet*. *Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036, 1040-1041 (11th Cir.), cert. denied, 506 U.S. 955 (1992).

ADEA waivers that was discussed did not involve any application of the ratification doctrine. See, *e.g.*, H.R. Rep. No. 664 at 26-27 (citing cases).

Congress did, however, consider the issue of an employee's simultaneous retention of severance benefits and pursuit of an ADEA claim. At least one corporation raised the concern that it would have to bear the high costs of litigating ADEA claims even where it had paid significant consideration for releases as part of a departure program. See H.R. Rep. No. 664 at 87 (dissenting views); see also S. Rep. No. 263 at 64 (minority views). Thus, it was understood that the OWBPA would permit an employee who signed an invalid waiver to pursue his or her ADEA claim while retaining the separation benefits paid under the waiver. See *Long*, 105 F.3d at 1540 n.19. At one point a substitute was proposed in committee, apparently in response to that concern. The substitute would have required that, if a waiver "is set aside for any reason, any damages received through a discrimination action *shall be* offset by the consideration received for the waiver," but it was not adopted by the committee. H.R. Rep. No. 664 at 91 (emphasis added); see also *id.*, at 23-30. There was no suggestion that the waiver would have been ratified by the employee's retention of the consideration already received.

C. The Court's Decision in *Hogue* Requires Rejection of the Tender Back Doctrine Under the ADEA

The Fifth Circuit has suggested that, even if the ratification doctrine would not bar an ADEA suit such as petitioner's, the suit is barred because petitioner did not tender back the severance payments she had received in conjunction with the invalid ADEA waiver before she pursued her suit under the ADEA. See *Wamsley*, 11 F.3d at 540-542. That approach is inconsistent with this Court's opinion in

Hogue v. *Southern Ry.*, 390 U.S. 516 (1968) (per curiam).

In *Hogue*, the Court held that an injured employee was not required to tender back the consideration he had received from his employer in exchange for a release of claims before the employee could bring suit under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51 *et seq.* As a threshold matter, the Court made clear that federal law, not state common law principles, controlled the issue. 390 U.S. at 517. The Court concluded that requiring a tender back as a prerequisite to suit under the FELA would be "wholly incongruous with the general policy of the Act," *i.e.*, to provide injured employees a right to recover for injuries negligently inflicted by their employer. *Id.* at 518. The Court ruled, however, that the sum already paid by the employer and retained by the employee must be deducted from the recovery (if any) obtained through a FELA lawsuit. *Ibid.*

The *Hogue* rationale applies with full force to cases under the ADEA. *Long*, 105 F.3d at 1541-1544. Like the FELA, the ADEA is a federal remedial statute designed to compensate employees for injuries caused by their employers' conduct and to deter employers from engaging in such conduct. See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 357-358 (1995) ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA"). And, like imposition of a tender back requirement under the FELA, imposition of such a requirement under the ADEA would compromise the statute's underlying purposes of compensating victims and deterring employers. A tender back requirement would enable an employer to escape sanction for age discrimination when a terminated employee lacks the resources to tender back his severance benefits prior to filing

suit—a situation not unlikely in the group intended to be protected by the OWBPA. See H.R. Rep. No. 664 at 23. Few individuals suddenly deprived of their job and their income would be able to tender back large severance payments:

> Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect [sic] on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would . . . encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct * * *.

Long, 105 F.3d at 1541-1542 (quoting *Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir.), cert. denied, 506 U.S. 955 (1992). And employees who do not receive the information required under the OWBPA by the time of the tender decision "would be no better off than before the OWBPA was enacted; they could be forced to make critical decisions [whether to surrender severance pay or waive all claims under the ADEA] without information deemed essential by Congress." *Id.* at 1542. A tender back requirement would render the OWBPA a nullity by "encourag[ing] employers to ignore the specific provisions of the Act in hopes that by the time their former employees discover that the releases that they signed are voidable, they will be in no economic position to tender back or refuse to accept the special severance benefits accorded them." *Oberg* v. *Allied Van Lines, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 769, 773 (N.D. Ill. 1992), aff'd, 11 F.3d 679 (7th Cir. 1993), cert. denied,

511 U.S. 1108 (1994); *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).[14]

The fact that the ADEA and its purposes are not identical to the FELA and its purposes does not preclude application of the *Hogue* rationale to ADEA cases:

> The mandate of *Hogue* is that tender back requirements imposed in connection with the release of federal rights be evaluated in light of the general policy of the statute in question. That the ADEA as amended by the OWBPA serves a purpose distinct from that underlying the FELA does not change the fact that a tender back requirement is "wholly incongruous" with the general policies of the ADEA and the OWBPA. In enacting the OWBPA, Congress specifically regulated ADEA releases in order to provide employees with protection not available at common law. To strip them of this protection through application of the common law principle of tender back would be anomalous indeed.

Long, 105 F.3d at 1541 n.22; but see *Wamsley*, 11 F.3d at 542. In *Fleming* v. *United States Postal Serv. AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995), Judge Posner explained that, although tender back generally would be a precondition to rescission of a contract, "[w]hen federal law limits a class of releases, as in cases under the Federal Employers' Liability Act, or the closely parallel Jones Act, or the Age Discrimination in Employment Act, each of which regulates releases, * * * the common law rule requiring tender * * * may have to give way." *Id.* at 261.[15] Moreover, although the *Fleming* court questioned the breadth of the rule precluding tender back under any federal law limiting releases, it emphasized that "*[o]f course* a worker who has executed a void release should not be barred from challenging it by his inability to tender back the consideration received, as the effect would be to make the release enforceable as a practical matter." *Ibid.* (emphasis added).[16]

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[14] Respondent's contention (Br. in Opp. 12) that failure to apply the tender back doctrine in ADEA cases would deter employers from offering severance benefits misconstrues the purposes and effect of the OWBPA. The OWBPA's purpose was to serve as an incentive to an employer to comply with its requirement of a knowing and voluntary waiver, including the OWBPA's statutory prerequisites, when the employer obtains waiver of ADEA claims from their employees. Compliance with the OWBPA's requirements (which an employer has the ability to control through the manner in which it drafts releases and offers severance programs) provides an employer with a defense to a suit alleging violation of the ADEA.

[15] The *Fleming* court declined to exempt Title VII from a tender back requirement because, in its view, *Hogue* cannot "be detached from its context, that of a federal statute that regulates releases, displacing common law rules." 27 F.3d at 261-262. By so ruling, the court expressly disagreed with *Botefur* v. *City of Eagle Point*, 7 F.3d 152, 155-156 (9th Cir. 1993). That disagreement is of no consequence in the instant case, however, because the OWBPA is "precisely such a statute" that regulates releases, displacing common law rules. *Long*, 105 F.3d at 1540 n.20.

[16] The Fifth Circuit's concern (*Wamsley*, 11 F.3d at 539 n.9) that, absent a tender back requirement, employees will finance their lawsuits against employers with funds provided by the employers, ignores the nature of the statute at issue. The class of employees protected by the OWBPA is one of the groups least likely to have the luxury of expending the funds received (usually severance benefits) on litigation expenses rather than living expenses because of the unlikelihood of their finding new employment and the possibility that they may not yet be entitled to Social Security or other retirement benefits. See H.R. Rep. No. 664 at 23; see also *Long*, 105 F.3d at 1543. And, of course, any employees "with baseless claims have

The Third and Seventh Circuit both have expressly held that "analogizing the policy of [the] ADEA to that of [the] FELA, and thus applying *Hogue*, is correct." *Oberg*, 11 F.3d at 684; *Long*, 105 F.3d at 1541-1542; see also *Forbus*, 958 F.2d at 1040-1041 (applying *Hogue* in context of invalid ADEA release that predated OWBPA); *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. at 1367.[17] Indeed, courts regularly have extended the reasoning of *Hogue* outside the context of FELA, including to statutes that are not as analogous to FELA as is the ADEA. See *Smith* v. *Pinell*, 597 F.2d 994, 996 (5th Cir. 1979) (Jones Act, 46 U.S.C. 688); *Botefur* v. *City of Eagle Point*, 7 F.3d 152, 156 (9th Cir. 1993) (42 U.S.C. 1983; noting that *Hogue* "is generalizable to suits under other federal compensatory statutes"); *Wahsner* v. *American Motors Sales Corp.*, 597 F. Supp. 991, 998 (E.D. Pa. 1984) (Automobile Dealers' Day in Court Act, 15 U.S.C. 1221 *et seq.*; emphasizing that benefits under federal statute may not be denied by state common law rules, and

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strong financial incentives to keep severance payments rather than risk them in prolonged litigation." *Ibid.* Further, respondent itself states that it is "undisputed that the overwhelming majority of plaintiffs enter into contingent fee arrangements with their lawyers, whereby the costs of litigation are taken from the ultimate recovery." Br. in Opp. 12. Attorney's fees are available as part of the award in an ADEA suit. *McKennon*, 513 U.S. at 357.

[17] A panel of the Sixth Circuit also has considered the question of tender back, albeit apart from the issue of ratification (which was not yet ripe due to the remand of the question whether the release complied with the OWBPA). *Raczak* v. *Ameritech Corp.*, 103 F.3d 1257 (1997). The majority of that panel held that the employees were not required to tender back the consideration they had received as a precondition to maintaining their suit under the ADEA. *Id.* at 1268-1270 (opinion of Jones, J.); *Id.* at 1071 (opinion of Guy, J.).

ruling that plaintiffs did not ratify their releases by failure to tender back); *Home Box Office, Inc.* v. *Spectrum Elecs., Inc.*, 100 F.R.D. 379, 382 n.1 (E.D. Pa. 1983) (communications laws); *Taxin* v. *Food Fair Stores, Inc.*, 197 F. Supp. 827, 830-831 (E.D. Pa. 1961) (antitrust law); see also *Long*, 105 F.3d at 1541 n.21 (citing cases).

As in *Hogue*, severance benefits retained by the employee may be offset against any recovery in the ADEA suit. See *Hogue*, 390 U.S. at 518. The ADEA gives federal courts "the discretion to 'grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act].'" *McKennon*, 513 U.S. at 357-358. It may be appropriate for a court to offset initial benefits paid to a particular employee against the ADEA award to that individual to the extent the two are duplicative, so long as the relief ultimately granted effectuates the purposes of the ADEA. See *Long*, 105 F.3d at 1543; *Oberg*, 11 F.3d at 684.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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JUNE 1997

(3)

No. 96-1291

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DOLORES M. OUBRE,
Petitioner,

v.

ENTERGY OPERATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

STATEMENT OF THE CASE

AARP adopts the Petitioner's statement.

INTEREST OF AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 30 million

* AARP's brief has not been approved or financed by petitioner or her counsel or any other party.

persons age 50 or older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's members are employed individuals, many of whom are protected by the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. § 621 *et seq*. (1994).

One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and to retain older workers, and to help older workers overcome the obstacles they encounter because of age. Since 1985, as part of its advocacy efforts, AARP has filed more than 150 *amicus curiae* briefs in the federal district and appellate courts and in the U.S. Supreme Court regarding the proper interpretation and application of the ADEA. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); and *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996).

AARP's concern in this case is that the courts not strip older workers of carefully crafted statutory protections at the time they are the most vulnerable to employer overreaching. If ratification and tender back principles override the Older Workers Benefit Protection Act (OWBPA), Pub. L. 101-433, 104 Stat. 978, 983 (1990), employers will have no incentive to follow the requirements Congress deemed necessary to prevent employer overreaching.

For these reasons, AARP submits its brief *amicus curiae.*

SUMMARY OF THE ARGUMENT

Congress affirmatively abrogated the common law principles of ratification and tender back when it enacted Title II of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978, 983 (1990). The OWBPA was enacted to prevent employers from unfairly obtaining waivers

from employees who were unaware of their rights under the ADEA and who lacked the knowledge to ascertain whether they had a potential claim under the ADEA. To address this problem, Congress created detailed statutory requirements that must be met for a waiver of ADEA rights or claims to be enforceable. A court cannot enforce a waiver to bar an ADEA suit if even one of the OWBPA's criteria is absent.

Moreover, even if Congress had not supplanted contract principles with the OWBPA, the *Restatement (Second) of Contracts* states that, as a matter of public policy, waivers that violate a statute, such as the OWBPA, may not be enforced. In enacting the OWPBA, Congress expressed its belief that due to the disparity in the bargaining positions of employers and employees, protecting older workers from unfair and abusive waiver practices outweighed any perceived interest in freedom of contract between them. Congress' judgment that waivers that do not comply with the OWBPA may not be enforced must be respected. Otherwise, employers will be able to thwart the express will of Congress by disregarding the OWBPA's explicit requirements knowing that they can discriminate based on age without repercussion.

Finally, ratification and tender back must not be judicially superimposed on the OWBPA because they harm the very group the OWBPA was designed to protect, older employees. Employers do not need the ratification and tender back doctrines to protect them against age discrimination lawsuits. Employers need to comply with the clear and specific requirements of the OWBPA, which provide employers with the defense they seek from age discrimination suits.

ARGUMENT

I. THE OLDER WORKERS BENEFIT PROTECTION ACT ABROGATED THE COMMON LAW PRINCIPLES OF RATIFICATION AND TENDER BACK.

The common law principles of ratification and tender back[1] are anomalous to both the letter and spirit of the OWBPA and did not survive its enactment. Common law principles survive a statute "only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991). In litigation under federal statutes, common law doctrines are appropriately applied only when the principles underlying such doctrines are consistent with the congressional intent expressed or implied in the statutes. *American Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982).

Congress was convinced that the common law did not adequately protect the rights of older workers asked to waive their rights under the ADEA:

[1] "The common law doctrine of ratification results in the enforcement of 'a promise to perform all or part of an antecedent contract of the promisor previously voidable by him.'" *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1535 n.10 (3d Cir. 1997) *citing Restatement (Second) of Contracts* § 85 (1981). The "tender back" doctrine "require[s] a refund as a prerequisite to institution of suit." *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968).

In most cases, these two common law contract doctrines are inextricably entwined. *See Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1373 (C.D. Ill. 1991) ("States that require a tender to challenge a release sometimes use the language 'condition precedent to suit' and sometimes use the language of 'ratification.' But there is no meaningful difference between the two.").

> Even the decisions that have followed the more protective 'totality of the circumstances' approach . . . have not held that certain protective factors *must* be present . . . The instant legislation, *by contrast*, will limit unsupervised waivers to certain situations and then spell out clear and ascertainable standards to govern those situations.

S. Rep. No. 79, 101st Cong., 1st Sess. 17 (1989) (emphasis added).[2]

In the OWBPA, Congress expressed a very specific intent to restrict the circumstances under which an employer may obtain a waiver[3] of ADEA rights and claims. "[T]he enactment of the OWBPA changed the legal landscape" concerning waivers of ADEA rights or claims. *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1997).

By specifically limiting the manner in which employers may secure such waivers, "Congress has occupied this area of the law." *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994). Judicially imposing ratification and tender back onto the comprehensive statutory scheme that Congress created for waivers of ADEA rights or claims would "rewrit[e] rules that

[2] "In enacting the OWBPA, Congress . . . rejected the applicability of common law contract principles and declined to embrace even the more demanding 'totality of the circumstances' test." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1538 (3d Cir. 1997).

[3] AARP concurs with the *amicus curiae* brief of the National Employment Lawyers Association (NELA) that there is a significant distinction between "waivers" and "releases," despite the fact that some, including many courts, use the terms interchangeably. Brief of NELA at 6. The OWBPA regulates "waivers" of ADEA rights and claims. While a waiver may be a term within a contractual agreement, a waiver is not a contract and contractual principles should be irrelevant in determining whether or not a waiver is valid and therefore enforceable.

Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

A. The Plain Language of the OWBPA Demonstrates Congress' Clear Intent To Abrogate the Common Law of Waivers, Including The Principles of Ratification and Tender Back.

This Court has long recognized that "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) *quoting Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). The specific question addressed by the principles of ratification and tender back is whether an employee *may waive* any right or claim under the ADEA merely by failing to return the benefits received in exchange for the waiver. Congress could not have spoken any more directly to this question when it declared that "[a]n individual *may not waive* any right or claim under this Act unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1) (emphasis added).

> [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last; 'judicial inquiry is complete.'

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981). With the language "an individual may not waive," Congress expressly divested individuals of any power to waive the OWBPA's protections or its requirements.

In addition to the explicit language in § 626(f)(1), Congress set forth a bottom line that all waivers must satisfy to be legally enforceable. Congress mandated that "a waiver

may not be considered knowing and voluntary unless at a minimum" all of the statutory requirements are met.[4]

Because the OWBPA establishes minimum or threshold requirements, *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373 (11th Cir. 1995), absolute technical compliance with its provisions is required. The absence of even one of the OWBPA's requirements invalidates a waiver. *Collins v.*

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[4] Section 626(f)(1) of the ADEA, as added by the OWBPA, requires that a waiver of "any right or claim" contain the following:

(A) the waiver is in writing and in plain language;
(B) the waiver specifically refers to rights or claims under the ADEA;
(C) the waiver does not cover prospective rights or claims;
(D) the waiver is in exchange for valuable consideration in addition to any benefits or amounts to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to signing the agreement containing the waiver;
(F) the individual is given at least 21 days within which to consider the agreement; however, if the waiver is requested in connection with a group termination program, each individual must be given at least 45 days to consider the agreement;
(G) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, then at the outset of the 45-day period the employer must inform each eligible employee, in writing, of the class of employees who are eligible, the specific eligibility requirements, any applicable time limits on participation, the job titles and ages of all employees eligible or selected for the program, and the ages of all employees in the same job classification or organizational unit who are not eligible or selected; and
(H) the individual must be given at least 7 days to revoke the agreement after signing it.

Outboard Marine Corp., 808 F. Supp. 590, 594 (N.D. Ill. 1992) ("Under the OWBPA, a release cannot be deemed knowing and voluntary unless *all* of the technical requirements of the OWBPA have first been satisfied.") (emphasis added). *See also Soliman v. Digital Equip. Corp.*, 869 F. Supp. 65, 69 n.13 (D. Mass. 1994) ("OWBPA . . . establishes a floor, not a ceiling.").

Congress recognized a single exception to its mandate that waivers of ADEA rights and claims must satisfy all of the OWBPA's requirements to be enforceable. Congress only excused waivers "in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative," 29 U.S.C. § 626(f)(2), from meeting all of the OWBPA's requirements. Such waivers need only meet criteria (A) through (E), 29 U.S.C. § 626(f)(2)(A), and a modified version of criterion (F).[5]

Despite Congress' clear intent to create a single exception, the Respondent would have this Court judicially engraft two others through the doctrines of ratification and tender back. Moreover, the exceptions these doctrines would add have the potential to swallow the rule established by the OWBPA. These doctrines effectively require enforcement of a waiver without any regard to whether it meets any of the OWPBA's criteria. These doctrines enforce waivers whenever an individual accepts consideration and does not tender it back prior to bringing an age discrimination lawsuit. These doctrines render the content of the waiver, and, thus, the OWBPA itself, irrelevant.

"Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus*

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[5] The individual must be provided a "reasonable," but unspecified, period of time within which to consider the settlement agreement, 29 U.S.C. § 626(f)(2)(B), as opposed to the 21-day and 45-day periods specified in §§ 626(f)(1)(F)(i) and (F)(ii) for all other waivers.

v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980), *citing Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942). Since Congress has clearly stated that the only circumstance in which a waiver need not meet all of the OWBPA's requirements is when the waiver is in settlement of a pending EEOC charge or court action, no other exceptions may be implied.

Finally, Congress spoke loudly and clearly in expressing its intent to abrogate contract principles through the OWBPA's specific provisions that supplant and exceed common law requirements concerning waivers. For example, the requirement that the waiver be in writing, 29 U.S.C. § 626(f)(1)(A), overrules decisions enforcing oral waivers. *See, e.g., Taylor v. Gordon Flesche Co.*, 793 F.2d 858, 862 (7th Cir. 1986). The requirement that the waiver be written in a manner "calculated to be understood by the average individual eligible to participate," 29 U.S.C. § 626 (f)(1)(A), overrules cases holding that if the plaintiff understood the waiver, whether anyone else would have understood it is irrelevant. *See Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir. 1986) (en banc). The requirement that waivers specifically refer to the ADEA overrules cases that enforced waivers that did not refer to the statute. *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir. 1987). The provisions requiring written advice to consult with a lawyer and providing a revocation period were unheard of at common law. Because of its special concern for employees terminated in reductions in force, Congress added two additional requirements for group terminations -- the extension of the time for the employee's consideration of the waiver from 21 to 45 days and the disclosure of job titles and ages of affected employees. These requirements constitute a complete departure from the common law.

In addition, under common law, an employee challenging a waiver had the burden of showing that it was not "knowing and voluntary." *See, e.g., Harrison v. Arlington Ind. School Dist.*, 717 F. Supp. 453, 455 (N.D. Tex.), *aff'd without op.*, 891 F.2d 904 (5th Cir. 1989). The OWBPA shifts this burden to the employer. *See* 29 U.S.C. § 626(f)(3). "The requirements

established in order for releases to be 'knowing and voluntary' under the OWBPA clearly exceed the protections available under the common law." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1539 (3d Cir. 1997).

The statutory text could not be clearer, nor could the legislative intent. Congress stated that only when each of the OWBPA's requirements is met will a waiver be considered valid and enforceable. If a waiver fails to comply with even one of these conditions, then "[n]o matter how many times parties may try to ratify such a contract, the language of the OWBPA, 'an individual may not waive,' forbids any waiver." *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994).

B. The Doctrines of Ratification and Tender Back Are At Direct Odds With the Purposes of the ADEA, As Amended by the OWBPA.

"[W]hen a statutory purpose to the contrary is evident, common law principles may not be applied." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). *See also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). The impact that common law principles would have on a federal statute's purpose and objectives determines whether they may be imposed on the statute. *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968). *Hogue*, the only Supreme Court decision to consider a "tender back" requirement for waivers of claims under a federal remedial statute, rejected the doctrine. After determining the impact on the purpose and objectives of the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 *et seq*. (1939), the Court ruled that a tender requirement would be "wholly incongruous with the general policy of the Act." 390 U.S. at 518. Ratification and tender back requirements would eviscerate the purposes of the ADEA, as amended by the OWBPA.

Congress enacted the ADEA to eliminate arbitrary age discrimination in the workplace. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); 29 U.S.C. § 621(b). The Act's objectives are to deter discrimination and to compensate

victims for injuries caused by the prohibited discrimination. *McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879, 884 (1995). The "vital element" that allows these objectives to be realized is that § 626(c) of the ADEA grants an age discrimination victim "a right of action to obtain the authorized relief." *Id.* at 884. Congress enacted the OWPBA to protect that "vital element" from overreaching employers.

The purpose of the OWBPA amendments to the ADEA is to "ensure[ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." S. Rep. No. 263, 101st Cong., 2d Sess. 2 (1990). Congress enacted the OWBPA to protect workers from abusive waiver practices by requiring employers to draft and seek waivers in strict compliance with the Act's provisions. The legislative history of the OWBPA makes clear that Congress did not want an older worker to be precluded from pursuing a meritorious ADEA claim unless she has knowingly and voluntarily relinquished the right to do so.

In order to protect employees' right to seek relief under the ADEA, the OWBPA restricts an employer's use of waivers as a defense to an ADEA claim. The statute requires, at a minimum, that the waiver comply with the technical requirements of the Act.[6] Cognizant that an employer's abusive and unfair practices may result in an employee's involuntary or uninformed waiver of ADEA rights,[7] Congress designed the OWBPA to ensure that the door to pursuing ADEA claims remains open to all but those who knowingly and voluntary choose to close it. "The objectives of the ADEA are furthered when even a single employee establishes that an

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[6] *See* H.R. Rep. No. 664, 101st Cong., 2d Sess. 51 (1990) ("Apart from specifying that a waiver must be knowing and voluntary, the legislation provides further requirements. Although some of these requirements may be further indicia of whether a waiver is knowing or voluntary, each requirement set forth in the bill must be satisfied independent of the knowing and voluntary factor for any waiver to be lawful.").

[7] H.R. Rep. No. 664, 101st Cong., 2d Sess. 22-23 (1990).

employer has discriminated against him or her." *McKennon* 115 S. Ct. at 885. If an employee fails to bring a claim of age discrimination because she cannot afford to tender back the consideration received for an invalid waiver, the purpose of the ADEA is frustrated: the employer is neither punished for, nor deterred from discriminating, and the elimination of discrimination is not advanced.

As numerous courts have cautioned, the principles of ratification and tender back will deter older employees from bringing age discrimination claims.[8] These principles would have a "crippling effect" on older workers' ability to challenge waivers under the OWBPA and pursue age discrimination claims because:

> [i]n general, retired employees need all the security they can get . . . . Such workers are unlikely to be able to put their severance payments aside for future "tenders," or to be able to come up with the money to make such tender at such later time as they might acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirement.

[8] *See, e.g., Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir. 1992) ("Forcing older employees to tender back their benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases based on misrepresentation or duress."); *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1270 (6th Cir. 1997) ("A tender-back requirement would deter meritorious ADEA filings."); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991) (*Hogue* rests on view that a tender requirement would deter meritorious challenges to waivers in FELA lawsuits; a tender requirement will have just as crippling an effect on ADEA challenges); *Soliman v. Digital Equip. Corp.*, 869 F. Supp. 65, 70 (D. Mass. 1994) ("To require plaintiff to tender back the benefits he has received as a precondition of going forward with his lawsuit would likely chill his prospects of prosecuting what may be a meritorious claim."); *Carr v. Armstrong Air Conditioning, Inc.*, 817 F. Supp. 54, 58 (N.D. Ohio 1993) (a tender requirement would deter meritorious challenges to waivers in ADEA claims).

Isaacs v. Caterpillar, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991).

Moreover, Congress explained the need for protective waiver provisions, stating:

> Age discrimination victims typically earn more than the minimum wage, but their average annual income is only $15,000. Moreover, once out of work, these older Americans have less than a 50/50 chance of ever finding new employment. They often have little or no savings, and may not yet be eligible for Social Security. Accordingly, it is reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises.

S. Rep. No. 79, 101st Cong., 1st Sess. 9 (1989), adopted by reference in S. Rep. No. 263, 101st Cong. 2d Sess. 15 (1990); H.R. Rep. No. 664, 101st Cong., 2d Sess. 23 (1990) (citations omitted).

These economic circumstances make older workers vulnerable to coercive and abusive waiver practices and clearly affect their ability to challenge an employer's discriminatory policies or practices. If ratification and tender back are superimposed on the OWBPA, many older employees will have little choice but to let employers' discriminatory policies and practices go unchallenged and unpunished. "No matter how egregiously releases might violate the requirements of the [OWBPA], employees would be precluded from challenging them unless they somehow could come up with the money they were given when they were allegedly forced into retirement." *Isaacs v. Caterpillar,* 765 F. Supp. 1359, 1367 (C.D. Ill. 1991). Given the likelihood that an older employee would be financially unable to return the consideration, ratification and a tender back requirement would effectively permit employers to purchase the right to ignore the mandates of the ADEA and the OWBPA altogether, without fear of repercussion.

II. WAIVERS THAT VIOLATE THE OWBPA ARE UNENFORCEABLE AS A MATTER OF PUBLIC POLICY.

Even if Congress had not abrogated the common law and "occupied this area of the law" with the OWBPA, *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994), and even if contract law applied to "waivers," the pertinent sections of the *Restatement (Second) of Contracts* demonstrate that employers whose waiver agreements violate the OWBPA may not enforce them.

"[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), *citing Restatement (Second) of Contracts* § 178(1).[9] Any interest in imposing ratification and tender back on the OWBPA clearly is outweighed by what will result if illegal waivers are enforced -- employers will have a license to discriminate based on age without repercussion, and thousands of older workers will lose their right to seek redress against unlawful discrimination.

The *Restatement (Second) of Contracts* explains why contractual terms that violate public policy may not be enforced:

> In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance. Sometimes, however, a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy. Such a decision is based on a reluctance to aid the promisee rather than on solicitude for the promisor as such. Two reasons lie behind this reluctance. First, a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction.

Restatement (Second) of Contracts, Chapter 8, Unenforceability on Grounds of Public Policy, Introductory Note.

In enacting the OWBPA, Congress decided that protecting older workers from unfair and abusive waiver practices "outweighed" any interest in giving effect to employers' and employees' "freedom of contract." Refusing to enforce invalid waivers is an "appropriate sanction" to discourage employers from ignoring the OWBPA.

The Restatement identifies four factors to consider "[i]n weighing a public policy against enforcement of a term." These factors are:

> (a) the strength of that policy as manifested by legislation or judicial decisions,
> (b) the likelihood that a refusal to enforce the term will further that policy,
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
> (d) the directness of the connection between that misconduct and the term.

Restatement (Second) of Contracts § 178 (3).

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[9] A public policy against the enforcement of promises or other terms may be derived by the court from

> (a) legislation relevant to such a policy, or
> (b) the need to protect some aspect of the public welfare . . . .

Restatement (Second) of Contracts § 179.

These four factors command that a waiver that violates the OWBPA, which is the "term" at issue,[10] may not be enforced as a matter of public policy.

First, the OWBPA is an exceptionally strong expression of the public policy against the "manipulation of older workers" based on their "lack of information or expertise." S. Rep. No. 79, 101st Cong., 1st Sess. 9-12 (1989).

Second, rejecting the doctrines of ratification and tender back as a means for employers to enforce their illegal waivers advances the OWPBA's policy of protecting individuals from being coerced or manipulated into waiving their ADEA rights or claims. Without these doctrines to fall back on, employers will have greater incentive to comply with the straightforward requirements of the OWBPA. All that the employer as the drafter of the waiver needs to do to obtain an enforceable waiver of ADEA rights and claims is simply to follow the statute's "cookbook" requirements.[11] When an employer drafts a waiver in accordance with the statutory minimum standards, the legislative intent that an employee's decision to waive her ADEA rights be "knowing and voluntary" will be advanced.

Third, the OWBPA's legislative history amply documents the employer overreaching and other misconduct that prompted Congress to enact waiver legislation.[12] Not surprisingly, there are allegations of coercion and misrepresentation in this case.

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[10] A waiver of ADEA rights or claims is usually a "term" in a separation agreement.

[11] "Employers should not need the ratification doctrine in order to ensure that their releases are effective: they need to comply with the OWBPA." *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1543 (3d Cir. 1997).

[12] "The House and Senate hearing records are replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA." H.R. Rep. No. 221, 101st Cong., 1st Sess. 10 (1989).

Finally, a direct relationship exists between the employer's misconduct and the illegal waiver. As stated above, Congress provided employers with clear instructions for drafting a valid waiver. Employers need only follow them.

The *Restatement* not only establishes that waivers that violate the OWBPA are unenforceable on grounds of public policy, it also negates a tender back requirement. Section 197, entitled "Restitution Generally Unavailable," provides:

> Except as stated in Sections 198 and 199 [Restitution in Favor of Party who Is Excusably Ignorant or Is Not Equally in the Wrong, and Restitution Where Party Withdraws if Situation Is Contrary To Public Interest], a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.
>
> Comment:
>
> a. *Rationale*. In general, if a court will not, on grounds of public policy, aid a promisee by enforcing the promise, it will not aid him by granting him restitution for performance that he has rendered in return for the unenforceable promise. Neither will it aid the promisor by allowing a claim in restitution for performance that he has rendered under the unenforceable promise. *It will simply leave both parties as it finds them, even though this may result in one of them retaining a benefit that he has received as a result of the transaction.*

Restatement (Second) of Contracts § 197 (emphasis added).

In short, the common law rule as distilled by the *Restatement* is that an employer, having created a waiver which violates the OWBPA, cannot seek return (restitution) of the

consideration paid for the waiver. Nor can the employer enforce the defective waiver. Instead, the employer's remedy is a set off of the amount of consideration paid for the waiver against any judgment for the employee.[13]

III. THE OWBPA WAS ENACTED TO PROTECT EMPLOYEES FROM OVERREACHING EMPLOYERS.

In determining whether or not the principles of ratification and tender back may be used to enforce waivers that do not comply with the OWBPA, it is critical to remember that, first and foremost, the OWBPA was enacted to protect employees from abusive and unfair waiver practices.

> The OWBPA was designed to protect employees negotiating with employers, not to protect employers from overreaching plaintiffs. Employers are, by far, in a better position to protect their own interests than are older employees.

Long, 105 F.3d at 1543. However, the principles of ratification and tender back benefit employers over employees, the intended beneficiaries of the OWBPA, in two very significant ways.

First, ratification and tender back do not return the parties to the status quo, as many employers suggest. Instead, these doctrines provide a significant windfall to employers. Consideration for a waiver agreement provides an employer with benefits that far exceed a defense against future age discrimination lawsuits. The employer is able to terminate a typically long-term, highly-paid employee and will no longer have to pay her salary and benefits. The employer is able to reduce the size of its work force, which often is one of its main

[13] *See Long*, 105 F.3d at 1543; *Oberg*, 11 F.3d at 684; *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995).

objectives.[14] The amount the employer pays the employee also "typically incorporates consideration for multiple factors not challenged in an age case: waivers for other violations of law or contract, rolled-in vacation and sick time, and a public relations benefit to the employer that itself may deter other litigation." *Long*, 105 F.3d at 1544.

Although an employee receives some benefits that she might not ordinarily receive when she signs a waiver, she gives up a substantial amount in return. In addition to her right to relief under the ADEA and other statutes, the employee loses her job, her salary and continued benefits. Moreover, if the employee returns the consideration, she is "deprived of money paid to induce him to retire, yet he or she is not restored to employment; all he or she gets is the rescission of his or her release." *Isaacs v Caterpillar, Inc.*, 765 F. Supp. at 1367.

In addition, it cannot be said that an individual who is permitted to challenge age discrimination without first returning the benefits receives a "windfall." If the waiver is declared invalid and the individual prevails in the suit, the benefits the individual received can be offset against the recovery.[15] If the waiver is upheld, the employer received what it paid for - a valid defense against the merits of the lawsuit.[16] Finally, if the waiver is struck down and the employee loses her lawsuit on the merits, the employer may complain that it paid for a waiver that failed. However, such a complaint should not fall on sympathetic ears since it was the employer whose faulty

[14] "The purpose of [early retirement] programs is to induce people to retire earlier than they otherwise would have done. Such early retirement is an economic benefit to the company. To get it, the company offers the employee money for leaving early." *Isaacs v Caterpillar, Inc.*, 765 F. Supp. at 1367.

[15] *Hogue*, 390 U.S. at 518; *Forbus*, 958 F.2d at 1041.

[16] A waiver is no guarantee that a suit will not be filed; it simply is a defense against a suit once filed. *Isaacs v. Caterpillar*, 702 F. Supp. 711, 715 (C. D. Ill. 1988).

drafting of the waiver subjected it to suit. After all, the employer only had to comply with the OWPBA's provisions and the waiver would have done its job.

Second, permitting ratification and tender back would allow employers to discriminate based on age without repercussion. By capitalizing on older employees' economic vulnerability, employers may coerce employees into signing waivers that clearly violate the OWBPA in order to buy silence against complaints of age discrimination. Indeed, the Respondent in this case admits that its waiver does not comply with the OWBPA. Yet, it claims it is not subject to challenge for its alleged discriminatory practices. If ratification and tender back override the OWBPA, employers, like the Respondent here, will have no incentive to comply with the OWBPA's waiver provisions.

Ratification and tender back unjustly enrich employers at the expense of the older employees for whose benefit the OWBPA was enacted. Ratification and tender back encourage employers to violate the OWBPA while buying immunity from challenges to their discriminatory policies and practices. These common law principles may not be imposed on the ADEA, as amended by the OWBPA.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed. AARP urges this Court to rule that Congress abrogated the common law principles of ratification and tender back when it enacted the OWBPA's comprehensive and remedial rules governing waivers of ADEA rights and claims.

Respectfully submitted,

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June 20, 1997

(7)

No. 96-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DOLORES M. OUBRE,

Petitioner,

v.

ENTERGY OPERATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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33 pp

QUESTION PRESENTED

Whether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the release binding.

LIST OF PARTIES

1. Dolores M. Oubre, Petitioner.
2. Entergy Operations, Inc., Respondent.

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TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered November 6, 1996, is not reported. The opinion of the United States District Court, Eastern District of Louisiana, rendered May 28, 1996, is also not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion and entered judgment on November 6, 1996. The petitioner filed a timely Petition for Writ of Certiorari within 90 days of the judgment pursuant to 28 U.S.C. §§ 1254 and 2101(c) and Supreme Court Rule 10(c). This Court has jurisdiction under 28 U.S.C. § 1254(b).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This action involves the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626, as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. 101-433, Title II, § 201, 104 Stat. 983 (1990), now incorporated at 29 U.S.C. § 626(f).

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who represent employees in labor, employment and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some of the more recent cases are *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996); *McKennon v. Nashville Banner Co.*, 115 S. Ct. 879 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA has an interest in the issues raised in this appeal because a substantial number of the cases in which its members are involved pose the issue of whether a plaintiff must tender back consideration supposedly received for a putative release or waiver of claims under the federal anti-discrimination statutes before challenging its validity. Although this case arises under the particular terms of the ADEA and the OWBPA, the issue recurs under other federal employment laws such as Title VII and the Americans With Disabilities Act. The brief argues that equitable and public policy considerations weigh against application of tender back and ratification to releases of federal anti-discrimination claims of all stripes.

The position NELA takes in the following brief has not been approved or financed by petitioner or her counsel.

The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

STATEMENT OF THE CASE

On September 26, 1995, petitioner Dolores Oubre, a former employee of Entergy Operations, Inc., filed suit in the United States District Court for the Eastern District of Louisiana. She claimed that her former employer (the respondent in this case) terminated her in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (ADEA). The district court granted summary judgment to the employer on May 23, 1996 on the ground that the employee signed a release at the time of her termination and ratified the release by failing to return the benefits of her severance package. The United States Court of Appeals for the Fifth Circuit affirmed this decision by unpublished opinion on November 6, 1996.

INTRODUCTION

Will employers sometimes mislead, confuse or coerce their employees into releasing their rights to sue under the federal anti-discrimination laws? Let us look at three such cases:

- Employee Pierce was offered a severance package as part of a reduction in force, which included a general release and waiver of claims. He had already filed an EEOC charge against the company, alleging race and age discrimination, and asked a company official whether the release would preclude his discrimination claims. The official said he did not believe it would and the company reconfirmed that view later. Pierce had just one business

day to accept the package. A jury found that the release signed by Pierce was not a knowing and voluntary waiver of his discrimination claims. *Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 110 F.3d 431 (7th Cir. 1997).

- Beadle was a police trainee. For religious reasons, Beadle requested that he not be assigned Saturday shifts, to observe his Sabbath. Beadle quit after the police department said no. Under his contract, Beadle was obliged to return $12,000 in training expenses to the city after his "commencement of full-time service as a police officer." The city offered to forgive repayment in exchange for a release of all claims. As it turned out, Beadle probably owed the city nothing under the contract because he had not yet commenced full-time service. A magistrate held that the release was not a knowing and voluntary waiver of his religious discrimination claims. *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir.), *cert. denied*, 115 S. Ct. 2600 (1995).
- Employee Hallas, with 35 years of service, was selected for lay-off. He filed an age discrimination charge with the EEOC. Two months later, a company representative offered Hallas an "early retirement" package on condition that he sign a release. The employer presented the package as a "take it or leave it" proposition and Hallas was not encouraged to seek an attorney's advice. Hallas stood to lose valuable medical benefits at once if he declined the package. He signed the waiver. The Court of Appeals found as a matter of law that Hallas did not knowingly and voluntarily waive his age discrimination claims. *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3d Cir. 1988).

Such cases put in perspective exactly what is at stake with the question presented to this Court. With their

tender back and ratification arguments, the employers seek more than the right to acquire releases or waivers of discrimination claims, a practice that this Court presumed was valid under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and that Congress has authorized in ADEA cases through the OWBPA. Rather, the employers want this Court's imprimatur on a doctrine that renders releases or waivers "challenge-proof," even when they are clearly invalid and procured through oppression or trickery.

NELA hopes, with this brief, to demystify some of the confusion surrounding the legal concepts of waiver, tender back and ratification. In Section I of the argument, we establish that waivers are treated differently at law than releases and that waivers should not be subject to the rule of tender back that applies to releases. In Section II, we show that tender back is not required when the relief sought is equitable in nature—which is true in federal anti-discrimination cases generally—because courts have the equitable power to fashion conditional decrees to provide a set-off in the employer's favor. Tender back should also be rejected for substantial equitable reasons grounded in public policy, namely the Congressional policy against workplace discrimination and the imbalance of bargaining power in at-will employment relationships. In Section III, concerning the employers' ratification argument, we demonstrate how ratification conflicts with the charge-filing and conciliation requirements under the anti-discrimination statutes and should be rejected.

Properly understood, too, the issues in this case go beyond claims under the ADEA. The issues of tender back and ratification recur under other federal employ-

ment statutes, such as the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* and the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*[1] And as this Court has noted, "[t]he ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995). The Court should avoid setting a special rule under one particular civil rights statute unless Congress affirmatively requires it. We show below that the doctrines of tender back and ratification are creatures of common law that clash with "the congressional effort to eradicate discrimination in the workplace," *McKennon*, 115 S. Ct. at 884, and, accordingly, that they should not apply to claims under the civil rights statutes.[2]

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[1] *See, e.g., Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994) (ratification under Americans With Disabilities Act); *Fleming v. United States Postal Service*, 27 F.3d 259, 260-62 (7th Cir. 1994) (tender back requirement under Title VII), *cert. denied*, 513 U.S. 1085 (1995); *Jordan v. Smithkline Beecham, Inc.*, No. 95-5707, 1997 WL 164277, at *6 (E.D. Pa. April 2, 1997) (Title VII and 42 U.S.C. § 1981); *Blackwell v. Cole Taylor Bank*, No. 96 C 0902, 1997 WL 156483, at *3 (N.D. Ill. March 31, 1997) (Title VII and ADEA); *Nigrelli v. Catholic Bishop of Chicago*, No. 84 C 5564, 1994 WL 240558, at *4 (N.D. Ill. May 27, 1994) (Title VII), *aff'd*, 68 F.3d 477 (7th Cir. 1995); *Melendez v. Horizon Cellular Telephone Co.*, 841 F. Supp. 687, 692 (E.D. Pa. 1994) (Title VII).

[2] Alternatively, NELA requests that the Court specifically reserve the question of whether tender back or ratification apply to statutes other than the ADEA. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (expressly reserving question whether the Federal Arbitration Act § 1 excluded certain kinds of employment contracts).

ARGUMENT

I. THE TENDER BACK AND RATIFICATION DOCTRINES SHOULD NOT APPLY TO WAIVERS OF ANTI-DISCRIMINATION RIGHTS

Lawyers, courts and commentators often speak of "waivers" and "releases" as if they are the same thing. They are not, and resolving the confusion is important in this case. A release—as one district court put it—is "an abandonment of a claim that might otherwise be enforced; it constitutes a defense to the assertion of a claim." *McCray v. Casual Corner, Inc.*, 812 F. Supp. 1046, 1048 (C.D. Cal. 1992). Releases are a species of contract which must be supported by consideration. *See, e.g., United States for Use of Youngstown Welding and Engineering Co. v. Travellers Indemnity Co.*, 802 F.2d 1164, 1167 (9th Cir. 1986) ("a release must be supported by consideration"); *Premier Electric Int'l Corp. v. Solar Devices, Inc*, 778 F.2d 71, 73 (1st Cir. 1985) ("under federal law, a valid release must be supported by consideration"). To determine the validity of a release, courts rely on conventional contract principles of assent and consideration, as well as the affirmative defenses of fraud, unconscionability, duress and the like. *Fortino v. Quasar Co.*, 950 F.2d 389, 394-95 (7th Cir. 1991) (Posner, J.) (contrasting releases with waivers).

A waiver is not a contract. Rather, it is a unilateral act with juridical significance: a knowing and voluntary renunciation of a legal right. *See, e.g., United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995). Although waivers can be included as terms in contracts, they need not be contractual and they are not judged by the contractu-

al standards of consideration and assent. Instead, courts evaluate the validity of waivers based on whether they were entered into knowingly and voluntarily. *Fortino*, 950 F.2d at 394-95.

This Court has wide experience with waivers, principally in the criminal procedural field but also occasionally in civil cases. In *Town of Newton v. Rumery*, 480 U.S. 386, 397-98 (1987), the Court reviewed a written release-dismissal agreement—in which a prosecutor agreed not to charge a person for a crime in exchange for the person's agreement not to sue—under waiver principles to determine whether it was voluntary, even though it was in the form of a contract. In *Fuentes v. Shevin*, 407 U.S. 67, 94-6 (1972), the Court reviewed a putative waiver of judicial process in a consumer installment contract to decide whether the customer's relinquishment of these rights was voluntary, knowing, and intelligently made under the circumstances.

This Court has previously indicated that relinquishment of anti-discrimination claims under federal law belong in the waiver category rather than the contractual category. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court reviewed a putative waiver of Title VII rights. There, the employer claimed that an employee's union waived his right to bring a Title VII action in its collective bargaining agreement. The Court rejected that argument. On the other hand, it stated that "presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement." *Id.* at 52. This Court noted that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settle-

ment was voluntary and knowing." *Id.* at 52 n.15.[3] Absent from the Court's opinion is any suggestion that prior seeking judicial review of a waiver, the employee must first tender back any consideration received.[4] Indeed, if we comb this Court's waiver cases, we will find no requirement that a party challenging the validity of the waiver must first restore the status quo ante. There is no sign that Ms. Fuentes had to return the furniture she bought on time to the creditor before a hearing on the waiver. And it would have been absurd to require that Mr. Rumery submit to rearrest and prosecution to challenge his waiver of his civil rights claim.

To determine whether a waiver is valid, we look to a variety of factors to determine whether the waiver was

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[3] This waiver approach has been fully observed by a majority of the circuits in Title VII and ADEA cases. *See, e.g., Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 65 F.3d 562, 571 (7th Cir. 1995); *Wright v. Southwestern Bell Tele. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990); *Bormann v. AT&T Communications*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988). A minority of circuits, while acknowledging the waiver standard, have applied contract standards to determine the validity of waivers. *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 361 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987).

[4] Indeed, not until 1989—fifteen years after *Alexander*—did any federal court report an opinion imposing such an obligation in an employment discrimination case. *Widener v. Arco Oil and Gas Company*, 717 F. Supp. 1211, 1217 (N.D. Tex. 1989).

"truly voluntary," rather than inquire into offer, acceptance and consideration as we do with contracts. *Fortino*, 950 F.2d at 394-95 (in distinguishing release from waivers, court notes that while releases are subject only to contract defenses, such as fraud and duress, waivers are to be judged by whether the abandonment of the claims was "truly voluntary"). A common articulation of the waiver test appears in *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3d Cir. 1988). There, faced with a putative waiver of a Title VII claim, the Third Circuit considered the following factors relevant to whether the waiver was voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 523 (quoting *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988)). The federal courts of appeals largely agree on these factors as relevant to adjudicating the validity of a waiver of anti-discrimination claims.[5]

[5] *Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 65 F.3d 562, 571 (7th Cir. 1995); *Wright v. Southwestern Bell Tele. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462 (continued...)

Looking upon these employer-employee agreements as waivers, we can now appreciate why the tender back rule should not bar challenges to their validity. The willingness or ability of the employee to return consideration at best only marginally bears on the critical issue of whether the original waiver was knowing and voluntary. Indeed, economic considerations—that the employee cannot afford to return the consideration—weigh at least as heavily (and probably more so) in severance situations. We also see that nothing in this Court's waiver decisions, such as *Fuentes* and *Alexander*, sets the stage for a tender back rule. Finally, as shown above, *Alexander* considered the relinquishment of anti-discrimination rights an important enough event to require proof of an individual, knowing and voluntary waiver. In sum, under standard waiver analysis, a party should be able to submit a putative waiver to a court for review without first returning the consideration. And as shown in the next section, if the employee prevails in his challenge to the waiver and on the merits of this claim, the court can use its equitable powers to condition a decree upon the return of consideration.

[5] (...continued)
(9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990); *Bormann v. AT&T Communications*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989).

II. THE COURT SHOULD EXERCISE ITS EQUITABLE POWER TO EXCUSE TENDER BACK OF CONSIDERATION TO CHALLENGE RELEASES OF ANTI-DISCRIMINATION CLAIMS

Section I of this argument concluded that there is no tender back barrier to testing the validity of a waiver. If the Court nonetheless determines that contractual, rather than waiver, standards apply to relinquishment of claims under anti-discrimination statutes, then it must confront the tender back issue. As we will see in this section, several considerations grounded in equity and public policy weigh against tender back in actions involving releases of federal anti-discrimination claims.

First, tender back does not apply to actions seeking equitable relief. The tender back rule was a creature of law rather than equity. While a party at law seeking rescission of a contract was generally required first to offer to return anything received before commencing suit, "[i]n equity, his failure to make such an offer before commencing a suit for rescission did not preclude relief." RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981). *See also* RESTATEMENT OF RESTITUTION § 65, cmt. d (1937) ("in equity, ... there need be no offer to restore antecedent to the proceedings"); Dan B. Dobbs, HANDBOOK OF THE LAW OF REMEDIES § 4.8 at 294 (1973) (plaintiff in equity "has no obligation before suit to make restitution of goods or money he received from the defendant"). The Restatement of Contracts declares that the availability of equitable relief excuses the tender back requirement:

> Where specific restitution is allowable under the rule stated in § 489, or where equitable relief of other kinds is allowable, an offer to restore what has been received by the injured party, is not a condition of the right to a decree. The decree of the court will impose such conditions on the defendant's duty of restitution with reference to the return of performance or its value as justice requires, and if these conditions are not complied with the plaintiff cannot obtain restitution.

RESTATEMENT OF CONTRACTS § 481 (1932).

History tells us the difference between the rules at law and equity in actions challenging contracts. At law, a party who sought rescission of a contract was required to tender back any consideration because, by so doing, the "plaintiff rescinded [the contract] by his own act and then based his case on a rescission that had been perfected before the action was commenced." George E. Palmer, THE LAW OF RESTITUTION § 3.11, at 295 (1978). On the other hand, if a party sought rescission of a contract at equity, tender back was not required because the rescission (and the obligation to return the consideration) did not occur until the court issued its decree. "Since rescission is not accomplished 'in equity' until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money he received from the defendant." Dobbs, *supra*, § 4.8 at 294.

Equity could afford to open its doors to contract challenges because, unlike law, it had the power to fashion a conditional decree at the end of the proceeding to require return of the consideration (or a set-off of any monetary award) as a condition for an award of relief to plaintiff. As the Restatement (Second) of Contracts declares, in equity a "decree could be made conditional on an offer [of tender]. At law, however, an offer was

traditionally regarded as a condition of the right to commence an action based on recission." RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981). *See also* RESTATEMENT OF RESTITUTION § 65 cmt. d (1937) (in equity, where "a conditional decree can be rendered, there need be no offer to restore antecedent to the proceedings").

Of course, as one commentator notes, none of this "mean[s] that the plaintiff is entitled to get back what he gave and keep what he got, too. It means only that he need not make formal tender before suit." Dobbs, *supra*, § 4.8 at 294-95. Courts have plenary powers to fashion an appropriate conditional decree on a finding of liability to provide a set-off in the employer's favor. "Once the matter proceeds to trial, the judge must act to assure that each party is restored to his pre-contract position, at least as far as possible to do so." *Id.* at 295. *See, e.g.*, *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp., 827, 831 (E.D. Pa. 1961) ("[s]hould the plaintiffs ultimately obtain a judgment against the defendants, the latter could be protected by our crediting the amount they paid for the release against the amount of that judgment"); *Falk v. Levine*, 60 F. Supp. 660, 663 (D. Mass. 1945) (in a final decree, equity court may "properly consider the question of interest in ordering the restoration of a status quo"). This is the answer settled upon by the Seventh Circuit in ADEA cases. In *Oberg v. Allied Van Lines*, 11 F.3d 679, 685 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994), the Court held that consideration paid to employees could be setoff at the conclusion of the case. So we should not be concerned that the employer will not ultimately receive equity in the form of a decree or setoff, if it is so entitled.

The exception to tender back in equitable cases applies conclusively to federal anti-discrimination statutes, which provide for equitable as well as legal relief. 29 U.S.C. § 626(b) (courts may "grant such legal or equitable relief as may be appropriate to effectuate the purposes of the [ADEA]"); 42 U.S.C. § 2000e-5(g) (under Title VII, court may order "equitable relief as the court deems appropriate"). While this Court has never passed on the question of whether Title VII actions are equitable or legal for the purposes of the Seventh Amendment jury right, *Landgraf v. USI Film Products*, 511 U.S. 240, 253 n.4 (1994), it has labeled Title VII backpay as equitable. *Local No. 391 v. Terry*, 494 U.S. 558, 571-72 (1990). Moreover, equitable relief for workplace discrimination may also include declaratory relief, injunction of unlawful practices, reinstatement or promotions. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (setting forth various remedies under Title VII). Any such relief could be ordered in a conditional decree, requiring return of the consideration.

Although Title VII was amended in 1991 to allow legal relief (42 U.S.C. § 1981a), the merger of law and equity in American courts erases the distinction between the two broad categories of relief for tender back purposes. The preference in cases seeking both kinds of relief should be to follow equity rather than law. RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b ("[t]he merger of law and equity and modern procedural reforms have made this distinction undesirable, and the rule stated in this Section reflects increasing criticism of this rule at law"); Palmer, *supra*, § 3.11 at 297 ("though acknowledging contrary authority, a court *should* hold that the equity practice applies to all actions, without

regard to their historical origins in law and equity"). Employees with anti-discrimination claims should not be denied their opportunity to seek equitable relief by operation of a rule that sprouted in legal soil.

Applying the equitable rule works especially well with challenges to putative releases of anti-discrimination claims. In Ms. Oubre's case, as well as most others reported, the severance or early retirement packages offered as consideration for releases are almost always money. Often, the severance is part of a reduction in force, which cuts off the employee's livelihood unexpectedly. The severance package is a lifeline to employees cut adrift from their jobs, which will (one hopes) tide them over until they find other work. This money, we might expect, is often spent as a substitute for wages lost on account of a sudden and unexpected period of unemployment: on living expenses, college tuition, mortgages and the like. Employers do not face a comparable hardship of having to meet expenses on a paycheck. Thus, any prejudice to an employer of having to wait until the end of the lawsuit to obtain a setoff for moneys paid for a release is substantially outweighed by the harm to employees of having to tender the payments back before even filing a lawsuit.

Second, the Court should also consider the retarding effect that tender back would have on the enforcement of the federal anti-discrimination laws. In *Hogue v. Southern Ry. Co.*, 390 U.S. 526 (1968), the Court held that in a Federal Employers' Liability Act case, an employer could not require return of a settlement amount (in that case, just $105.00) as a precondition of suit. The Court first noted that federal law applied to the issue (*id.* at 517). It then held that under federal law, tender back

was generally not required when there is a defense alleged against enforcement of the contract, including duress, fraud, and mutual mistake. *Id.* Tender back, the Court reasoned, would interfere with the railroad employees' right to recover just compensation for their injuries. *Id.* at 518. The analysis is no less true under the anti-discrimination statutes: tender back is an insurmountable obstacle for many who sign a release during a reduction in force.

We do not have to speculate whether tender back would damp down civil rights enforcement, because the current split in the circuits furnishes a laboratory for proving what will occur in a tender back regime. Since the beginning of 1991—the year in which the Fourth and Fifth Circuits, respectively in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) and *Grillet v. Sears Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991), declared their adherence to the tender back rule in ADEA cases—there have been just six reported opinions in the district courts of those two circuits involving challenges to releases in ADEA cases, all of which foundered on tender back or ratification.[6] By contrast, in the Seventh Circuit alone where

[6] In the Fourth Circuit: *Blistein v. St. John's College*, 860 F. Supp. 256 (D. Md. 1994) (enforcing release), *aff'd on other grounds*, 74 F.3d 1459 (4th Cir. 1996); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075 (E.D.N.C. 1991) (enforcing release). In the Fifth Circuit: *Blakeney v. Lomas Information Systems, Inc.*, 879 F. Supp. 645 (N.D. Tex.) (enforcing release), *aff'd*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996); *Wamsley v. Chaplin Refining & Chemicals Inc.*, 11 F.3d 539 (5th Cir. 1993) (enforcing release), *cert. denied*, 115 S. Ct. 1403 (1994); *Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994); *Norton v. Houston Industries Inc.*, 65 Empl. Prac. Dec. (CCH) ¶43,252 (S.D. Tex. 1994) (enforcing release).

there is no tender back rule for ADEA cases,[7] there have been ten challenges to such releases reported in the same period, seven of which avoided dismissal or summary judgment.[8] This experience suggests that the rules advocated by respondent indiscriminately discourage even valid claims that an employer overreached in obtaining a release.

The release issue reaches beyond merely private disputes between employers and employees. This Court and Congress recognize that workplace discrimination is not purely a private matter. These cases are imbued with a public interest to enforce America's anti-discrimination

[7] *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.), *cert. denied*, 511 U.S. 1108 (1993). *But see Fleming v. United States Postal Service*, 27 F.3d 259 (7th Cir. 1994) (applying tender back rule to Title VII claim).

[8] *Blackwell v. Cole Taylor Bank*, No. 96 C 0902, 1997 WL 156483 (N.D. Ill. Mar. 31, 1997) (no tender back required in Title VII and ADEA case); *Tice v. American Airlines, Inc.*, No. 95 C 6890, 1997 WL 80911 (N.D. Ill. Feb. 21, 1997) (no tender back required); *Daly v. Runyon*, No. 95 C 5954, 1996 WL 754112 (N.D. Ill. Jan. 30, 1997) (finding no waiver of claim); *Bibel v. Ridgewood High School*, No. 96 C 3110, 1996 WL 568785 (N.D. Ill. Oct. 3, 1996) (release enforced); *EEOC v. Spiegel, Inc.*, No. 90 C 6363, 1993 WL 34749 (N.D. Ill. Feb. 9, 1993) (release enforced); *Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 91 C 3776, 1993 WL 18437 (N.D. Ill. Jan. 26, 1993), *aff'd in part, vacated and remanded in part*, 65 F.2d 562 (7th Cir. 1995), *appeal after remand*, 110 F.3d 431 (7th Cir. 1997) (release not enforced); *Seward v. B.O.C. Div. of General Motors Corp.*, 805 F. Supp. 623 (N.D. Ill. 1992) (release enforced); *Oberg v. Allied Van Lines, Inc.*, 59 Empl. Prac. Dec. (CCH) ¶41,706 (N.D. Ill. 1992) (release not enforced), *aff'd*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Collins v. Outboard Marine Corp.*, 808 F. Supp. 590 (N.D. Ill. 1992) (release not enforced); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1559 (C.D. Ill. 1991) (release not enforced).

laws. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("[t]he private right of action remains an important part of Title VII's scheme of enforcement, . . . [and] Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself"); *Alexander*, 415 U.S. at 45 ("Congress gave private individuals a significant role in enforcement process of Title VII"). Although the EEOC has authority to institute civil actions in federal courts on behalf of charging parties (42 U.S.C. § 2000e-5(f)), this authority was crafted "to supplement, not replace, the private action" available to aggrieved persons. *See General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980). The nation's efforts to enforce anti-discrimination laws in the workplace are compromised if employers can privately negotiate an economic disincentive against victims who might otherwise seek relief, and then enforce even unlawful bargains on grounds of tender back or ratification.

Third, another public policy consideration opposed to tender back is that releases of anti-discrimination claims are often formed under conditions where there is a great imbalance of bargaining power. The Court may recognize the relevance of bargaining power from its two 1972 decisions about the standard that applies to enforcement of a waiver of judicial process under state replevin statutes: *Fuentes v. Shevin*, 407 U.S. 67, 94-5 (1972), and *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). The Court noted in both cases that the balance of bargaining power between contracting parties is an important factor in assessing the knowing and voluntary nature of the waiver. In *Fuentes*, the Court considered in two consolidated appeals the due process

implications of replevin statutes that allowed creditors to seize merchandise without notice and a hearing. The creditors argued in each case that the debtors signed sales contracts that specifically allowed pre-judgment repossession. But the Court held that the contracts, under the circumstances, did not present an effective waiver: "There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power." *Fuentes*, 407 U.S. at 95. By contrast, in *D.H. Overmyer*, the Court enforced a contractual waiver of prejudgment notice and hearing under a financing contract. There, the defaulting party was a major corporation. This was not a case of unequal bargaining power or overreaching, the Court held, yet "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." *D.H. Overmyer*, 405 U.S. at 188. Releases of anti-discrimination claims will ordinarily fall more toward the *Fuentes* pole than the *D.H. Overmyer* pole. In Ms. Oubre's case and many others, the waivers obtained from employees during reductions in force are offered (as in *Coventry*) on a "take-it-or-leave-it" basis to people whose primary source of income is about to be cut off. The lack of bargaining power under these circumstances is another powerful argument against tender back.

For all of the above reasons, we urge the Court to find that tender back does not apply to releases of anti-discrimination claims as a matter of equity.

III. RATIFICATION SHOULD NOT APPLY TO RELEASES OF ANTI-DISCRIMINATION CLAIMS BECAUSE THE EEOC CHARGE FILING REQUIREMENTS PROVIDE THE EXCLUSIVE TIMING RULES

The principle of ratification states that where a contracting party learns of a basis for invalidating a contract (such as fraud or misrepresentation) but does not take prompt steps to do so, the court may enforce the contract in spite of the defects:

> The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake he does not within a reasonable time manifest to the other party his intention to avoid it.

RESTATEMENT (SECOND) OF CONTRACTS § 381(2) (1981). A typical formulation of this rule is found in *FDIC v. Aetna Casualty & Surety Co.*, 947 F.2d 196, 203 (6th Cir. 1992): "the power of avoidance may be forfeited if the party who was induced by fraud to enter into the agreement unreasonably delays avoiding the contract."[9] The question presented in this case asks whether it is proper to import this concept of "unreasonable delay" into the anti-discrimination arena.

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[9] The doctrines and policies of tender back and ratification are very closely related and are often presented in tandem. *See Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, 1536 (3d Cir. 1997) (reviewing tender back and ratification arguments); *Pierce*, 65 F.3d at 572 n.2 (failure to return the consideration where tender back was not required also did not constitute a ratification). As with tender back, NELA urges that the ratification rule be rejected because it would interfere with the enforcement of anti-discrimination statutes and insulate unfair and oppressive releases from any judicial review.

Ratification should be rejected in the anti-discrimination context because Congress already established a comprehensive scheme for the timing of these complaints. If an employee seeks to bring a federal employment discrimination action, he or she must file a charge within 180 to 300 days of the alleged discriminatory practice.[10] In the case of a reduction in force, for instance, this means that employees must file a charge within 180 or 300 days of when the termination decision was communicated to the employee. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). The statutes also provide for investigation and conciliation by the EEOC[11] and, if that fails, a private party has 90 days from receipt of the EEOC's final determination to file his or her own lawsuit.[12] A ratification rule would short-circuit this carefully crafted procedure whenever a judge could be persuaded that it would have been "reasonable" for an employee to file a charge or complaint before the time prescribed by the statutes, as (for example) where the EEOC is still investigating a matter.[13] Finally, a challenge to a misleading or fraudulent release (which might otherwise have provided a basis for equitable estoppel or tolling under Title VII (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)) could, under the ratification doctrine, be held to come too late to be "reasonable" for purposes of ratification. Such results would contravene Congress's express intentions and would sow doubt about the proper limitations period for anti-discrimination claims. For these reasons, ratification should be rejected.

[10] 29 U.S.C. § 626(d) (charge filing requirements for ADEA); 42 U.S.C. § 2000e-5(e) (prescribing limitation period for Title VII charges); 42 U.S.C. § 12117 (ADA limitations period adopted from Title VII).

[11] 29 U.S.C. § 626(b) (conciliation under ADEA); 42 U.S.C. § 2000e-5(b) (conciliation under Title VII); 42 U.S.C. § 12117 (ADA procedures adopted from Title VII).

[12] 29 U.S.C. § 626(e) (limitations under ADEA); 42 U.S.C. § 2000e-5(f)(1) (limitations under Title VII); 42 U.S.C. § 12117 (ADA procedures adopted from Title VII).

[13] An ADEA plaintiff may, but is not required to, file a civil action 60 days after filing a charge. 29 U.S.C. § 626(d).

CONCLUSION

For the foregoing reasons, NELA respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed. We urge that this Court reject the application of tender back and ratification to putative waivers or releases of rights under the federal anti-discrimination statutes.

Dated: June 20, 1997

Respectfully submitted,

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No. 96-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES M. OUBRE,

Petitioner,

v.

ENTERGY OPERATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE ILLINOIS STATE CHAMBER OF COMMERCE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, under the Older Workers Benefit Protection Act, an employee ratifies a release of claims under the Age Discrimination in Employment Act which does not satisfy the technical requirements of the OWBPA by retaining sums paid for the release.

LIST OF PARTIES

1. Petitioner is Dolores M. Oubre

2. Respondent is Entergy Operations, Inc.

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TABLE OF AUTHORITIES

OPINION BELOW

The November 6, 1996 decision of the United States Court of Appeals for the Fifth Circuit is reported at 112 F.3d 787. The May 28, 1996 opinion of the United States District Court for the Eastern District of Louisiana is not reported.

JURISDICTION

The Fifth Circuit Court of Appeals rendered its decision on November 6, 1996. The Petition for Writ of Certiorari was filed February 4, 1997 and granted April 21, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(b).

STATUTE INVOLVED

This case involves Section 201 of the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. 101-433, Title II, 201, 104 Stat. 983 (1990), incorporated at 29 U.S.C. § 626(f).

INTEREST OF *AMICUS CURIAE*

The Illinois State Chamber of Commerce ("Illinois Chamber") is a voluntary membership organization of over 4,000 Illinois employers with over one million employees, local chambers of commerce and a variety of trade and professional organizations.[1] Over one-third of

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[1] The Illinois Chamber's brief has not been approved or financed by respondent, its counsel or any other party. Pursuant to Supreme Court Rule 37.3(a), the Illinois Chamber presents herewith its consent letters from the parties.

the Illinois Chamber's members are smaller employers with 100 or fewer employees. The Illinois Chamber is committed to the success of the business community in Illinois—a business community providing millions of satisfying jobs throughout the state. An overwhelming majority of the Illinois Chamber's employer members will be affected by the Court's decision in this case. The Illinois Chamber has filed briefs *amicus curiae* in various state and federal courts including the United States Supreme Court. In this Court, the Illinois Chamber has participated *amicus curiae* in the case of *Walters v. Metropolitan Education Enterprises, Inc.*, 117 S.Ct. 660 (1997).

SUMMARY OF ARGUMENT

The Fifth Circuit properly concluded that a release which does not meet the technical requirements of the OWBPA cannot, on its own, preclude an employee from asserting an ADEA claim. However, the Fifth Circuit also correctly concluded that if the employee has been given a severance package in exchange for the release, the employee must choose between keeping the severance benefits and, thereby, ratifying the release, and returning the benefits and pursuing an age discrimination claim. This practical decision should be affirmed because the OWBPA does not displace the common law doctrine of ratification. The OWBPA simply enumerates the criteria necessary for a waiver of ADEA claims to be effective as written. Ratification is consistent with the ADEA's express goal of promoting private agreements between employers and older workers.

Moreover, the well-established concepts of ratification and tender back actually promote private agreements and protect employers that are imperiled by the OWBPA's vagueness when applied to real world business decisions. These concepts also protect employers from litigious employees who can easily create fact issues concerning the circumstances surrounding execution of a release. Lastly, they protect employees by allowing them the choice between keeping a benefit package they would not have received absent the release or pursuing ADEA claims.

Rejection of the ratification or tender back doctrines in the ADEA context, especially when based upon a faulty comparison to the Federal Employer's Liability Act, is likely to have a chilling effect on employers' desires to offer enhanced benefits to employees who, for various business reasons, must be let go. In reality, this will hurt the numerous employees who have no interest in litigation and would prefer to obtain extra severance benefits for themselves and their families.

STATEMENT OF THE CASE

The Illinois Chamber adopts the respondent's Statement of the Case.

ARGUMENT

The central issue in this case is whether an employee, by accepting and retaining severance benefits provided by an employer in exchange for a release of claims, ratifies an otherwise unenforceable waiver of age discrimination claims. The resolution of this issue can be

expected to affect thousands of employment decisions, as businesses restructure, downsize, or consolidate in response to changing economic conditions. Ratification is a fundamental contract law principle which was known to the Congress, but not addressed, when it enacted the OWBPA. The tender back issue concerns whether equity should require the employee to return the severance benefits before proceeding with an ADEA action.

If the decision below is overturned, it will inevitably increase the flood of ADEA litigation presently occupying the district courts. Moreover, it will discourage employers from offering severance benefits to employees in exchange for releases. The Illinois Chamber's members have raised this concern, and the Illinois Chamber believes such results already are occurring. To the extent employers do offer such severance benefits, reversal will encourage terminated employees to accept the benefits and then to pursue the very type of litigation the employer paid to avoid. Indeed, litigation stands to be financed by the severance payments intended to prevent such future disputes, contrary to the preference of Congress for settlement of employment discrimination claims.

The petitioner's position disregards the extreme difficulties employers can encounter when attempting to comply with the OWBPA waiver provisions; the ease with which former employees seeking to escape a waiver can create a fact issue concerning the waiver's validity; and the manner in which the OWBPA can be abused. She does so by suggesting that the OWBPA completely displaced common law contract principles when no such intent is expressed in the statute.

I. PETITIONER MISREADS THE OWBPA.

Petitioner asserts that older employees who execute faulty severance agreements in exchange for severance benefits should be able to both sue their former employers for age discrimination and keep the severance benefits designed to foreclose such litigation. In an effort to persuade the Court that such individuals should not be required to tender back the enhanced severance benefit, petitioner reads provisions into the OWBPA concerning ratification which do not exist. In essence, petitioner claims the OWBPA displaces the common law principle that a voidable contract may be ratified. While Congress was plainly aware of the long-standing legal doctrine of ratification (*See Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996); RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981)), it did not address the issue in the statute, nor did it discuss whether an employee seeking to disclaim a waiver may do so without tendering back the consideration she received for the waiver. This is not surprising as the OWBPA's purpose appears to be more limited. The statute simply sets forth the requirements that must be met for a waiver to be enforceable as written. If those requirements are not satisfied, the employer will not be able to enforce the written waiver.

This being said, the OWBPA's language should not be construed to mean that an employee is precluded from waiving his claims no matter how much he may wish to do so. As the Fifth Circuit has noted, such a result would contravene OWBPA's purpose.

> We do not interpret the language of section 626(f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of

> legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of section 626(f)(1) and is supported by the legislative history of the OWBPA.

Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534, 539 (5th Cir. 1993). For these reasons, the Fifth Circuit held that "neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Id.* at 539-540. Petitioner's contrary conclusion is not supported by the statutory text on which she relies.

In rejecting the concept that a release which does not satisfy the OWBPA's requirements can be ratified, the Sixth Circuit recently criticized the Fourth and Fifth Circuits on the basis that, "[t]he OWBPA unambiguously states at Section 626(f)(1) that an individual 'may not waive' ADEA claims unless the OWBPA requirements are met. There is no hint of any exception." *Howlett v. Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. Lexis 20504, at *7 (6th Cir. Aug. 5, 1997). The Sixth Circuit, however, does not address the language of Section 626(f)(1)(G). As the Fifth Circuit noted in *Wamsley,*

> Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. If non-compliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G).

11 F. 3d at 539. Thus, a prohibition of ratification cannot be read into the OWBPA.

II. COMPLYING WITH THE REQUIREMENTS OF THE OWBPA IS FAR FROM A SIMPLISTIC PROCESS.

Contrary to petitioner's argument and the reasoning of the Sixth Circuit in *Howlett v. Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. Lexis 20504, at *12-13 (6th Cir. Aug. 5, 1997), compliance with the OWBPA just is not as simple as it may seem. Consider, for example, the requirement in 29 U.S.C. § 626(f)(1)(H) that, "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must provide information as to:

> (i) any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Unfortunately for employers, the OWBPA does not define "same job classification or organizational unit" and the phrase is fraught with the potential for dispute. Likewise, the OWBPA contains no insight as to the meaning of the phrase "exit incentive or other employee termination program," and it does not define what is meant by "a group or class of employees." The statute neither prescribes the time frame the employer must

consider in determining whether the termination of several employees during a period of weeks or months involves "a group or class of employees," nor does it illuminate whether multiple sites or facilities must be aggregated for the same purpose. In fact, the statute offers precious little guidance for employers, which must attempt to ascertain when the 45 day notice period of Section 626(f)(1)(F)(ii) and the special information requirements of Section 626(f)(1)(H) are triggered.

These statutory vagaries present tremendous problems for employers. Because of these potential pitfalls, the Illinois Chamber's larger employer members face a host of challenges when attempting to comply with the OWBPA. Consider a national company that cuts its number of operating divisions in half and consolidates into fewer divisions. As a result of this restructuring, numerous sales and engineering personnel are terminated, along with production personnel, while some sales and engineering personnel are retained. Sales offices are consolidated with research and development departments from a variety of sites and from various former divisions. This reduction and consolidation program is implemented over a period of eighteen months. If older employees from unit A are being offered severance packages in exchange for releases of ADEA claims, is the employer obligated to make rolling disclosures about eligible employees in units B and C because personnel from all three units are later consolidated into unit D? If so, which persons and what job classifications are relevant, and will this differ depending on whether the person displaced is in production, sales or engineering?

Consider a company with multiple facilities which determines that a reduction in force will be implemented

entirely from one of its sites. While the OWBPA speaks in terms of providing information from the employing unit—which has generally been interpreted to mean the facility at which the affected employees worked—one court has recently held that the disclosures should have contained information on employees at the other sites. *See, Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368, 372 (11th Cir. 1995). If an employer provides the required information, based on its view of the relevant job classification or organizational unit, and a former employee later contends that a different classification or unit should have been used, any waiver obtained by the employer will be imperiled. If the employee's view of the relevant classification or unit ultimately prevails, any payment made for the waiver would be, under the petitioner's reasoning, nothing more than lost money. Should a good faith effort to comply with OWBPA's disclosure requirements result in releases simply being deemed void because the employer could not intuit the intent of Congress?

Finally, consider a smaller, unsophisticated employer that is forced to let two employees go because of business conditions. Suppose that employer offers a severance package to the employees with less than 45 days to consider it in order to help ensure that the employees can pay their bills. While not in strict compliance with the OWBPA, should such agreements simply be declared void, thereby forcing these employers to fund litigation against themselves? These are real issues confronting unsuspecting employers in the business world and are far from the picture of deliberate deception on the part of employers painted by petitioner and her *amici*.

Considerations such as these helped to persuade the Fifth Circuit in *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), and the Court below to endorse the principle that a waiver is voidable, not void, under the OWBPA and can be ratified by retaining the benefits received in consideration for the waiver even after learning that one or more of the requirements in Section 626(f) were not satisfied. As *Wamsley* emphasized, "one of the expressed purposes of the ADEA [was] 'to help employers and workers find ways of meeting problems arising from the impact of age on employment.' 29 U.S.C. § 621(b)." 11 F.3d at 539. Thus, the statute expressly encourages settlement and compromise rather than litigation. Specifically, as the Fifth Circuit explained in *Wamsley*,

> [t]he simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation. Were employers forced to assume the risk that noncompliance with all [the] statutory requirements of Section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly, they would be disinclined to propose such solutions.

Id.[2] As noted in *Wamsley*, overturning the Court of Appeals ruling in this case will frustrate the goal of compromise; will dissuade employers from offering severance packages to many older workers who are pleased to receive them; and, likely will generate further litigation under the ADEA.

[2] *Wamsley* rejected the Seventh Circuit's reasoning in *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994) which held that waivers which do not satisfy the OWBPA are void. The Seventh Circuit has subsequently questioned the logic of its own decision. *See*, *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). ("The idea behind these cases [finding releases void] . . . is a little obscure to us.")

III. WITHOUT THE PROSPECT OF RATIFICATION, EMPLOYEES CAN EASILY AVOID THE OWBPA.

Wamsley also illustrates the ease with which a former employee seeking to escape a waiver can create an issue of fact about the waiver's validity under the OWBPA. The notice pertaining to release of claims in *Wamsley* expressly informed the affected employees that they could take up to 45 days to consider the proposed release. 11 F.3d at 536. Nonetheless, the former employees who executed the release later sued under the ADEA, alleging that the release was invalid because the employees were not given 45 days to consider it, as required under 29 U.S.C. § 626(f)(1)(F)(ii). The employer moved to dismiss based on the release, and it also submitted affidavits "specifically denying that [the employees] were told to execute and return the releases prior to the expiration of the 45-day period." *Id.* at 537. The employees responded with affidavits of their own, claiming that they were told orally by certain employer representatives that, to receive benefits under the Termination Pay Plan, they had to execute the release no later than their termination date, which was less than 45-days after they received the notice. Thus, the Fifth Circuit held that the plaintiffs' evidence was sufficient to create an issue of fact precluding summary judgment as to the validity of the waivers under the OWBPA. *Id.* at 538. As

the Court later observed in explaining its further holding that the waivers were not void but voidable, and hence subject to ratification,

> the nature of [the employees'] attack on the agreements assured [the employees] of a fact issue with which to avoid summary judgment on [the issue of the validity of the waivers]. Thus, were we to conclude that [the employees'] waiver agreements were void from their execution, [the employer] would be facing continued litigation with opponents who could use, and possibly have used, to finance their suit, the very funds [the employer] paid as consideration to avoid litigation.

Id. at 539, n. 9. Thus, even an agreement which, on its face, meets all of the OWBPA requirements can be attacked without consequence to the employee if offending agreements are considered void rather than voidable.

Petitioner and her *amici* argue that, in the event she were to prevail in her ADEA action, the severance payments made by Entergy could be deducted from any award determined to be due her. This argument, however, fails to address what will happen if ratification is not enforced and Entergy later prevails on the merits. In that event, there will be no damage award against which to offset the additional severance payments. Entergy will have been found not liable for any discrimination, Entergy will have borne the considerable cost and expense of litigation and Entergy will have been denied any recovery of the severance payments made to petitioner. In the name of advancing the policies of the OWBPA, a company that does not discriminate on the basis of age will be treated more harshly than one that does. Congress could not have intended this bizarre result.

IV. IF THE UNDERLYING DECISION IS OVERTURNED, THE POTENTIAL FOR ABUSE IS GREAT.

As the Fourth Circuit remarked in *Blistein v. St. John's College*, 74 F.3d 1459, 1462 (4th Cir. 1996), "an unfortunate, although foreseeable, pattern" of age discrimination litigation has developed wherein employees negotiate handsome severance packages, wait until they collect every benefit available to them under their agreements and then turn around and sue their employers for age discrimination.

Consider the scenario in *Blistein*. There the employee was informed that his position was being eliminated. He then negotiated a severance package including health benefits, tuition assistance for his children, approximately $15,000 cash, medical benefits for his dependent children and art studio space in exchange for a release of all claims. When the state subsequently denied him unemployment benefits, he pursued an age discrimination claim. 74 F.3d at 1463.

Similarly, consider the facts in *Cberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994), where three employees chose to accept enhanced benefit packages including cash benefits of $15,871.51, $25,717.23 and $21,887.70 respectively, plus health benefits and pension contributions in exchange for a release of claims, expressly including ADEA claims. After all the benefits were paid, each sued Allied for age discrimination. 11 F.3d at 680-681.

These scenarios are neither rare nor isolated. In order to deal with this vexing problem, courts have invoked the tender back requirement. *Blistein*, 74 F.3d at 1466. As one recent district court put it in implementing a rule

requiring a tender back of severance benefits in all civil rights cases before it, "no federal district court can ignore the wave of dubious and potentially extortionate discrimination cases currently flooding the federal docket." The court attributed this problem to the fact that the current law enables such lawsuits to be brought at little or no risk to the plaintiffs. *Kristoferson v. Otis Spunkmeyer*, No. 96 Civ. 2521, slip op. at 8 (S.D.N.Y., June 4, 1997).

The same scenario is prevalent throughout the district courts. If the underlying decision here is overturned, employees will only be emboldened to take the money and then to take a free roll of the dice in hopes of an additional recovery.

V. FELA IS MATERIALLY DIFFERENT THAN THE ADEA.

Petitioner attempts to bolster her argument that invalid OWBPA releases are void rather than voidable based upon this Court's thirty year-old decision on a statute which simply cannot be considered analogous to the ADEA. Contrary to her arguments, petitioner's position is not supported by this Court's disposition in *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968), brought under the Federal Employers' Liability Act. *Hogue* is distinguishable for at least three reasons.

First, the respondent carrier in *Hogue* confessed error in this Court and declined to argue that the applicable law required a tender back of the consideration paid by the carrier for an employee's release. The issue, therefore, was not controverted in this Court, and the Court dealt with the case in a brief *per curiam* opinion entered without the benefit of adversary presentations.

Second, the Court's limited holding in *Hogue* focused squarely on the parties' mutual mistake regarding the extent of the employee's injuries. The employee injured his knee while working in the respondent carrier's shop. Liability under the FELA was not disputed. The parties believed, however, that the injury was not a particularly serious one, and the carrier therefore paid the employee $105 in exchange for a full release. Thereafter, it was determined that the employee was permanently injured, requiring two operations, one of which caused him to lose a kneecap. Under these circumstances, the Court held that the employee did not need to tender back the $105 in order to maintain an action for further compensation under the FELA. In the Court's words, "[w]e hold that a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries." 390 U.S. at 517. No such mutual mistake of fact is at issue in this case.

Third, and perhaps most important, there is a substantial difference between the FELA and the ADEA, and that difference bears directly on *Hogue's* applicability to the present dispute. As the Fifth Circuit explained in *Wamsley*, the FELA was designed for purposes far different from those of the ADEA. The FELA was intended to provide liberal recovery for injured workers and thus to shift from the workers to the railroads the heavy cost of the severe injuries suffered in railroad operations. The statute deliberately stripped employers of their common law defenses and sought to encourage "'unburdened and expeditious recoveries'" by injured rail workers. 11 F.3d at 541, *quoting Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979). By contrast, in the ADEA, Congress sought to

foster employment based on ability rather than age and to prohibit arbitrary age discrimination. Congress created a new right of action, but it did not express a desire actively to facilitate an ADEA claimant's recovery. *Wamsley,* 11 F.3d at 541. FELA is a statute under which liability is a given in most cases and typically the principal issue is the quantification of damages; but liability is almost always a critical issue under the ADEA, and the statute creates no presumption that a termination of employment was motivated by age discrimination. In the Fifth Circuit's words,

> the FELA has effectively rendered liability of the employer a given in the great majority of cases, leaving quantification of damages as the principal focus of settlement negotiations. No such inference of liability exists as to ADEA claims; mere termination of employment is not sufficient to establish liability. An ADEA claimant faces the burdensome task of proving that the termination of his employment was the result of unlawful age discrimination. Therefore, the elements to be considered in the settlement of an ADEA claim involve not only damages, but also the more critical issue of threshold liability.

Id. at 542. The *Wamsley* court therefore concluded that "the Seventh Circuit in *Oberg*[3] . . . improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that *Hogue* precludes a 'tender back' requirement in suits brought under the ADEA." *Id.* at 541, n.13.

[3] *Oberg v. Allied Van Lines,* 11 F.3d 679 (7th Cir. 1993), *cert. denied,* 511 U.S. 1108 (1994).

There is no basis, in record evidence or otherwise, for the assertion that petitioner or other employees would be unable to tender back their severance payments if they were required to do so as a condition of maintaining an ADEA action. Ability to tender back has never been put in issue here. Petitioner has not offered to return her enhanced benefits or sought a payment schedule that would enable her to do so over a period of time. Rather, she has simply sought to retain those benefits and nevertheless to sue Entergy under the ADEA.

Likewise, there is no basis for the argument that a tender back requirement would encourage employers to ignore the specific provisions of the OWBPA. Employers who seek releases in exchange for substantial cash payments would hardly be eager to see the prospect of litigation restored by a return of those payments. Rather, employers seek to obtain a lasting release and freedom from future litigation. They therefore have a strong incentive to ensure that releases are enforceable from the outset under the OWBPA.

In any event, the long established principle that a contract may be ratified by a party who retains the consideration was not overturned by the OWBPA. More importantly, finding ratification of releases covering civil rights claims is the best means to comply with the intent of Congress to promote private resolution of age discrimination claims. This encourages employers to offer such settlements due to a reasonable expectation that they are final or binding absent timely revocation.

CONCLUSION

For the foregoing reasons, the Illinois Chamber respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Dated: August 20, 1997

Respectfully submitted,

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No. 96-1291

(11)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES OUBRE,
Petitioner,
v.

ENTERGY OPERATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC), the Chamber of Commerce of the United States (the Chamber), and the Edison Electric Institute (EEI) respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the position of Respondent Entergy Operations, Inc. before the Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes 300 major U.S. corporations. EEAC's directors and officers include many of industry's foremost experts in the field of equal employment opportunity. Their combined experience gives EEAC valuable insight into the practical, as well as legal, issues surrounding the proper interpretation and application of fair employment laws and policies. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The United States Chamber of Commerce is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than three million busi-

[1] Counsel for EEAC, the Chamber, and EEI authored the brief in its entirety. No person or entity, other than EEAC, the Chamber, EEI, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

nesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment law issues of national concern to the business community.

Amicus Edison Electric Institute ("EEI"), is the association of investor-owned electric utilities in the United States and their industry associates worldwide. EEI's U.S. members serve 99% of all customers served by the investor-owned segment of the electric utility industry. They generate about 78% of all the electricity generated by electric utilities, and service 76% of all ultimate customers in the nation. EEI members, who employ hundreds of thousands of employees, are now restructuring their companies as competition in the provision of electricity to end-use customers is being introduced in the states. Resolution of the issues raised in this case will have a significant impact on every EEI member. EEI is a frequent advocate on behalf of its members' interests in connection with important issues of law and policy that arise before courts, legislative bodies and regulatory agencies.

EEAC's members, as well as many of the Chamber's and EEI's members, are all employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (as amended), as well as other employment laws and regulations. As employers, and as potential respondents to ADEA charges and other employment related claims, these companies are interested in encouraging the voluntary resolution of such claims—both actual and potential—without the costs, risks, and other burdens associated with litigation.

When implementing workforce reductions, many employers offer special, added benefits to departing employees who agree to release legal claims they might otherwise assert against the employer. Individuals

who voluntarily accept this option by signing general releases receive enhanced severance benefits—*e.g.*, supplemental cash payments, extended health care coverage, additional pension benefits, and the like—over and beyond any benefits the employer has committed to provide upon termination of their employment. In return, the employer gains relief from the lingering uncertainties and potential liabilities it otherwise would face until expiration of the filing dates for all possible claims relating to the individual's employment. Because of the significant, mutual advantages they afford to both employees and employers, such release-for-consideration agreements are used widely in implementing workforce reduction programs throughout the United States.

Thus, the issues presented in this case are extremely important to the nationwide employer constituencies that EEAC, the Chamber, and EEI represent. Petitioner and her *amici* urge this Court to permit former employees, who have signed releases and accepted consideration in exchange, to sue their employers under the ADEA without returning the consideration they received. Such a rule of law would cast serious doubt on the finality of releases of claims under the ADEA. As a result, employers who would not offer additional severance pay, early retirement incentives, and other termination benefits without the protection of a release are likely to consider discontinuing such programs. Each discontinued program will harm the vast majority of individuals who elect to receive such benefits and have no interest in filing discrimination charges.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in a variety of cases before this Court, the United States Courts of Appeal; and various state supreme courts. As part of this amicus activity,

EEAC has filed briefs with all of the circuit courts of appeals that have addressed this issue.[2] In addition, EEAC[3] and the Chamber[4] have participated in cases in this Court regarding the proper interpretation of the ADEA.

EEAC also served on the Equal Employment Opportunity Commission's Older Workers Benefit Protection Act Negotiated Rulemaking Advisory Committee. The Committee held meetings over an eight-month period and crafted a consensus document in the form of a proposed rule interpreting Title II of the OWBPA, which the Commission has published for notice and comment. *Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA)*, 62 Fed. Reg. 10787 (1997) (to be codified at 29 C.F.R. pt. 1625) (proposed Mar. 10, 1997).[5]

[2] *Raczak v. Ameritech Corp.*, No. 94-8033 (6th Cir.) (petition for leave to appeal pursuant to Rule 1292(b)); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997); *Raczak v. Ameritech Corp.*, No. 95-1082 (6th Cir.) (on petition for rehearing); *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997); *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *reh'g denied* (11th Cir. June 22, 1992), *cert. denied*, 506 U.S. 955 (1992); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991).

[3] *Allied Van Lines v. Oberg*, No. 93-1605 (U.S.), *cert. denied*, 114 S. Ct. 2104 (1994) (application of ratification/tender back principles to ADEA releases); *K Mart Corp. v. Helton*, No. 96-98 (U.S.), *cert. denied*, 117 S. Ct. 447 (1996) (representative action procedure); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) (comparator within protected class); *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996) (pension accrual); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (definition of "willful" violation); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrability).

[4] *K Mart Corp. v. Helton*, No. 96-98 (U.S.), *cert. denied*, 117 S. Ct. 447 (1996); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1983) (standard for computing liquidated damages); *WCLR Radio Station v. Rengers*, 486 U.S. 1020 (1988) (damages).

Thus, EEAC, the Chamber, and EEI have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, EEAC, the Chamber, and EEI are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Dolores Oubre is a former employee of Respondent Entergy Operations, Inc. (Entergy). J.A. A-17.[6] After receiving a low performance ranking for 1994, she and others with similarly low rankings were offered two options. *Id.* One choice was to attempt to improve their performance ratings. J.A. A-18. The other was to take a voluntary severance package in exchange for a release of claims. *Id.*

The release, which is set forth in full at J.A. A-18-19 and J.A. A-61-62, covered "any and all claims, demands, damages, actions, or causes of action occurring on or before the date of the execution of this Release . . . that I may have against Entergy Operations, Inc. . . . which in any way relate to my employment by or my separation from the company." J.A. A-61. Oubre understood the terms, and indeed consulted two attorneys about the release. J.A. A-19. She accepted the package and signed the release. J.A. A-18. Oubre received everything due to her, and has not returned any money to Entergy. J.A. A-19.

Thereafter, Oubre sued Entergy, claiming that she was constructively discharged in violation of the ADEA. J.A. A-4-8. Oubre contended that the release she had signed was unenforceable because it did not

[5] The Committee agreed not to address in the proposed rule the issue presented to the Court in this case.

[6] J.A. refers to the Joint Appendix filed by the parties.

meet the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). J.A. A-19.

The district court granted summary judgment in favor of Entergy. Based on the Fifth Circuit's decisions in *Wamsley v. Champlin Refining & Chemicals*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), and *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996), the district court concluded that Oubre had ratified an otherwise voidable waiver by retaining the benefits. J.A. A-20. The Fifth Circuit affirmed. J.A. A-23. Oubre petitioned this Court for a writ of certiorari, which was granted as to the third question presented. 114 S. Ct. 1466 (1997).

SUMMARY OF ARGUMENT

"A party may not rescind a contract without returning to the other party any consideration received under it." *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 260 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). Retention of the consideration paid results in ratification of an otherwise voidable contract, including a contract to release statutory claims arising out of the employment relationship. *E.g.*, *Deren v. Digital Equip. Corp.*, 61 F.3d 1 (1st Cir. 1995); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 937 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994).

The Fifth Circuit below, as well as the Fourth Circuit, correctly apply these basic principles to preclude a former employee from bringing suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, when that person has executed a release of ADEA claims and retained the consideration paid for the release. *Wamsley v. Champlin Refining & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Blistein v. St. John's College*,

74 F.3d 1439, 1466 (4th Cir. 1996). This Court's decision in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), which dealt with very different circumstances under a very different statute, does not apply.

Moreover, the waiver provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (OWBPA), which set standards for an irrevocable release, do not abrogate the common law doctrine of ratification. To challenge a release, even one that arguably does not meet OWBPA's minimum requirements, a prospective plaintiff still must tender back the consideration.

Nothing in the statutory language of OWBPA allows a plaintiff to challenge a release as invalid while keeping the consideration received for signing the release. The legislative history likewise is silent. Since statutes in derogation of the common law must "speak" to the question, *United States v. Texas*, 507 U.S. 529, 534 (1993), OWBPA cannot be read to supplant the common law doctrine of ratification.

Moreover, application of the ratification/tender back doctrine is consistent with the purposes of the ADEA and OWBPA, as well as with sound public policy. Precluding ratification would substantially undermine an employer's reason for offering consideration in exchange for a release. Accordingly, such a rule would be likely to reduce substantially the amount employers would be willing to pay for releases.

ARGUMENT

AN ADEA CLAIMANT WHO FAILS TO TENDER BACK CONSIDERATION PAID FOR A RELEASE THAT DOES NOT MEET THE OWBPA REQUIREMENTS RATIFIES A VOIDABLE CONTRACT AND CANNOT CHALLENGE ITS VALIDITY

A. Under Established Principles of Contract Law, Which Apply to Contracts for the Release of Employment Discrimination Claims, an Individual Cannot Both Repudiate the Contract and Retain the Consideration

"The principle that a release can be rescinded only upon a tender of any consideration received is not a peculiarity . . .; it is a general principle of contract law, and would surely be a component of any federal common law of releases." *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 260-61 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (citations omitted). A release or waiver of claims is a contract. *PMX Indus., Inc. v. LEP Profit Int'l*, 31 F.3d 701, 703 (8th Cir. 1994). An agreement to waive or release claims is voidable when it has been procured by circumstances that would make an ordinary contract voidable (*i.e.*, misrepresentation, duress or undue influence). *DiRose v. PK Management Corp.*, 691 F.2d 628, 633 (2d Cir. 1982), *cert. denied*, 461 U.S. 915 (1983) (holding that contract induced by duress is voidable, not void).

The avoidance of obligations under a voidable contract, however, is not automatic. The party seeking to avoid the contract must do two things: (1) act quickly to rescind the contract once the circumstances making the agreement voidable are discovered (*e.g.*, misrepresentation), or removed (*e.g.*, duress); and (2) return the consideration received for the contract. An otherwise voidable agreement—including a release of employment claims—may become a binding contract by conduct that is inconsistent with an intent to rescind the agreement. *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 409 n.7 (9th Cir. 1992) (after accepting the benefits of an agreement for four years, party may no longer avoid the agreement based on claimed duress). Rescission does not simply terminate a contract after a particular date; it "unmakes" the contract so that the parties return as quickly and as nearly as possible to their respective pre-contract conditions. *See*, *United States v. Texarkana Trawlers*, 846 F.2d 297, 304 (5th Cir.), *cert. denied*, 488 U.S. 943 (1988) (party seeking rescission of contract must return proceeds); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (acquiescing in a contract after the opportunity to avoid it, or failing to return benefits conferred under a contract, results in ratification of a voidable contract even if agreement was obtained under duress); *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (plaintiff was obligated to return the money he received for signing the release as a prerequisite to rescission).

Courts apply this basic contract principle to releases of employment claims. *See, e.g.*, *Deren v. Digital Equip. Corp.*, 61 F.3d 1, 2 (1st Cir. 1995) (holding that plaintiffs' ERISA suit was barred under a contract waiving all claims, because plaintiffs' delay between accepting severance benefits and bringing suit ratified the release contract notwithstanding the allegedly coercive terms under which plaintiffs originally signed the agreement); *Fleming*, 27 F.3d at 260-61 (Title VII settlement agreement could not be rescinded without tendering back the consideration received); *Ferguson v. Runyon*, 1997 U.S. App. LEXIS 12492, *4 (7th Cir. May 22, 1997) (Title VII suit could not be brought without returning to employer consideration received for settlement); *Wag-*

ner v. Nutrasweet Co., 95 F.3d 527, 532 (7th Cir. 1996) (Title VII and Equal Pay Act claims require tender back where consideration for release surpassed payment to which employee otherwise was entitled); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 937 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994) (plaintiffs who did not return the consideration for their releases thereby ratified otherwise voidable releases and could not pursue employment claims under the WARN Act even assuming the releases were not knowing and voluntary); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (release of liability under employment compensation contract was ratified by acquiescence and accepting the severance benefits paid in exchange); *Somervell v. Baxter Healthcare Corp.*, 1997 U.S. Dist. LEXIS 7885, *14 (D.D.C. June 4, 1997) (barring suit under the ADA because plaintiff ratified unsigned release by retaining consideration).

The Fifth Circuit below, as well as the Fourth Circuit, correctly apply this rule to cases brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq. Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Blakeney v. Lomas Info. Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996); *Blistein v. St. John's College*, 74 F.3d 1439, 1466 (4th Cir. 1996). The Third, Sixth, Seventh, and Eleventh Circuits do not. *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), *petition for cert. filed*, 60 U.S.L.W. 3840 (June 9, 1997) (No. 96-1988); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997), *petition for cert. filed*, (June 18, 1997) (No. 96-2002); *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992).

For the reasons set forth below, the view taken by the Fourth and Fifth Circuits is better.

B. This Court's Decision in *Hogue v. Southern Railway Co.* Is Not Applicable to Employment Discrimination Cases

Petitioner and her *amici* urge this Court to apply *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), in which the Court declined to require a tender back in the context of a release of claims under the Federal Employers Liability Act, 45 U.S.C. § 51 (FELA), to reach a similar result under the ADEA. As the Fifth Circuit properly concluded in *Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), *Hogue* addressed a different issue under significantly different circumstances and thus is inapposite to the issue presently before the Court.

1. Hogue *Interprets the FELA, Which Facilitates Tort Recovery for Injured Railroad Employees*

The FELA claim in *Hogue* involved a worker who injured his knee while working for the defendant railroad. Relying on the railroad's doctor's assurances that his injury was only a bruise, the worker signed a release in exchange for $105. Later, after two operations, including the removal of his kneecap, he sought to reopen his claim and seek additional compensation without returning the original $105.

When the railroad sought to enforce the release, this Court concluded that a "tender back is . . . not requisite when it is pleaded that the carrier and the employee entered into the release from *mutual mistake* as to the *nature and extent of the employee's*

injuries." *Hogue*, 390 U.S. at 517 (emphasis added).[7]

The Court's ruling in *Hogue* is not surprising, given the purposes of the FELA. The FELA provides a cause of action closely approximating workers compensation for railroad employees injured on the job.[8] The FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329 (1958). As the Court has explained, "[t]he cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier." *Id.*

The FELA effectuates this purpose by providing a remedy for an injured worker in virtually any situation where the employer's negligence was even remotely a contributing cause of the injury.[9]

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played

[7] Instead, the Court directed, the original amount should be deducted from the ultimate award. *Hogue*, 390 U.S. at 518.

[8] The FELA is not a true "workers compensation" scheme imposing liability without fault. *CONRAIL v. Gottshall*, 114 S. Ct. 2396, 2404 (1994); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 509 (1957). Nevertheless, as discussed below, a "relaxed standard of causation applies." *CONRAIL*, 114 S. Ct. at 2404.

[9] The operative provision, 45 U.S.C. § 51 states:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, work, boats, wharves or other equipment.

> *any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death.

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506-07 (1957) (citations omitted) (emphasis added). *See also, CONRAIL v. Gottshall*, 114 S. Ct. 2396, 2404 (1994) (quoting *Rogers*). The traditional common law defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine are unavailable under the FELA.[10] Instead, "[t]he burden of the employee is met, *and the obligation of the employer to pay damages arises*, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference [that negligence of the employer played a small part in the injury]." *Rogers*, 352 U.S. at 508 (emphasis added). Thus, liability for a FELA claim is significantly less difficult to establish than in other fault-based litigation.

2. *Because of the Significant Differences Involved,* Hogue *Is Inapposite to the Case at Bar*

The Seventh Circuit in *Oberg v. Allied Van Lines*,[11] 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct.

[10] 45 U.S.C. § 53 (contributory negligence); 45 U.S.C. § 54 (assumption of the risk); 45 U.S.C. § 51 (fellow servant doctrine).

[11] Notably, another panel of the Seventh Circuit has questioned *Oberg*, stating "[t]he idea behind these cases . . . is a little obscure to us." *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994).

2104 (1994), and the Eleventh Circuit in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992), as well as the panel majorities in *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997), *petition for cert. filed* (June 18, 1997) (No. 96-2002), and *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3840 (June 9, 1997) (No. 96-1988), all rely on the *Hogue* holding to conclude that employees who have failed to tender back consideration received for signing a release may nonetheless sue their employers for age discrimination under the ADEA. Because the actual issues, as well as the two statutes in question, have virtually nothing in common, the decision in *Hogue* is inapplicable to the situation presented here. *Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534, 540-542 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1266-68 (Boggs, J., dissenting); *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, 1549 (3d Cir. 1997) (Greenberg, J., dissenting).

In *Hogue*, the existence of liability was not at issue. "The fact of the injury was never in doubt." *Raczak*, 103 F.3d at 1267 (Boggs, J., dissenting). Given the "mutual mistake" as to the nature and extent of the injuries, the issue to be resolved was the extent of Southern Railway's liability *beyond* the first $105. 390 U.S. at 516. Because Hogue was entitled to the $105 in any event, there was no reason to require that he tender it back. Indeed, the employer in *Hogue* "confessed error" at ever having made the argument, and did not file a brief or present argument on the "tender back" issue before this Court. *Id.*

In ADEA cases, there is substantial controversy over the legitimacy of the underlying claim. For example, in contrast to *Hogue*, there is a real question

as to whether Respondent Entergy discriminated against Petitioner Oubre on the basis of age in the instant case, and thus whether she suffered an injury *at all* due to age discrimination, or would be entitled to *any* compensation from Entergy. Unlike *Hogue*, the money initially paid to Petitioner was not in satisfaction of any acknowledged liability, but rather, consideration given in exchange for her agreement to waive and release all claims.

As the Fifth Circuit pointed out in *Wamsley*, the Seventh Circuit in *Oberg*, in adopting the reasoning of the Eleventh Circuit in *Forbus*, followed *Hogue* without considering the differences between the FELA and the ADEA. 11 F.3d at 541 n.13. Instead, the Seventh Circuit relied solely on its perception that both are "remedial" statutes and concluded that they thus should be treated alike.

Unlike the "resource allocation" approach taken by the FELA, however, the ADEA provides a remedy only where an employer has discriminated on the basis of age. 29 U.S.C. § 623(a); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."). The FELA was intended to "adjust[] the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden," S. Rep. No. 460, 60th Cong., 1st Sess. 3, *quoted in Sinkler*, 356 U.S. at 330 (1958). By contrast, the ADEA's prohibitions are intended "to promote employment of older persons based on their ability rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (emphasis added).

Moreover, to prevail on an ADEA claim for discriminatory termination, for example, the plaintiff must prove that he was discharged "because of" his age. 29 U.S.C. § 623(a)(1). Unlike the FELA—where the plaintiff need only show that the employer's conduct played only the "slightest" part in the injury—the plaintiff in an ADEA case must prove "that the employee's protected trait actually played a role in [the employer's decision making process] and had a determinative influence on the outcome." *Hazen Paper Co.*, 507 U.S. at 610. *Cf. St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2751 (1993) ("[W]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the *employer has unlawfully discriminated.*") (emphasis in original).

Thus, while the FELA imposes liability any time the employer's negligence played the slightest part in causing injury, the ADEA imposes liability only where the plaintiff proves not only that the employer's conduct affected the plaintiff, as under the FELA, but also that the plaintiff's age had a determinative role in the employer's action. Accordingly, as a practical matter, recovery by a railroad employee who is injured on the job is far more probable than by an employee who claims that an adverse employment action was based on age.

Thus, *Hogue* is decidedly inapposite to the case presently before this Court. It does not represent "federal common law" but rather is an interpretation of the specific terms of the FELA. As the Fifth Circuit stated in *Wamsley*:

> What Congress did under the FELA was something it has not yet done under the ADEA, that is, to legislatively facilitate an employee/claimant's recovery. Until Congress demonstrates its desire to promote "liberal," "unburdened and expeditious recoveries" to claimants under the ADEA, *Grillet* will remain sound authority and unaffected by *Hogue*.

11 F.3d at 541-42. Indeed, one federal judge aptly has noted, "it seems to me far-fetched to infer that the Supreme Court abrogated the ratification doctrine and tender back requirement for all federal remedial statutes in all cases through the medium of a three-paragraph *per curiam* opinion like *Hogue*." *Reid v. IBM Corp.*, 74 FEP Cases (BNA) 332, 344 (S.D.N.Y. 1997).

The better view is that *Hogue* does not supplant the general common law doctrine of ratification/tender back and should not be applied in the circumstances presented in this case.

C. The Older Workers Benefit Protection Act Does Not Abrogate the Common Law Doctrine of Ratification

As the Fourth and Fifth Circuit Courts of Appeals have held correctly, the outcome of a case in which a potential plaintiff has executed a release and retained the consideration should not differ where the case involves application of the waiver provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (OWBPA). While Section 201 of Title II of the OWBPA sets standards for a *non-voidable*, "knowing and voluntary" waiver of claims under the ADEA, it does not displace the common law rule of ratification of a voidable agreement.

OWBPA was compromise legislation developed after years of discussion and numerous revisions. In 1988, during the waning days of the 100th Congress, legislation was introduced in both Houses to mandate supervision of ADEA waivers by the Equal Employment Opportunity Commission (EEOC), the federal agency with ADEA enforcement authority. Under both bills, every release covering age discrimi-

nation claims would have had to be supervised by the EEOC unless the individual already had asserted a "bona fide claim" of age discrimination against the employer. S. 2856, 100th Cong., 2d Sess., 134 Cong. Rec. S14,509 (daily ed. Oct. 4, 1988); H.R. 5500, 100th Cong., 2d Sess., 134 Cong. Rec. H10,154 (daily ed. Oct. 12, 1988). Congress adjourned without acting on either bill.

When the 101st Congress convened in 1989, ADEA waiver bills again were introduced in both Houses, this time differing slightly from their predecessors and from each other. The Senate bill, S. 54, retained the EEOC supervision requirement. S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S168 (daily ed. Jan. 25, 1989). The House counterpart, H.R. 1432, would have required instead that an ADEA release be approved by a court before signature. H.R. 1432, 101st Cong., 1st Sess., 135 Cong. Rec. H697 (daily ed. Mar. 15, 1989). As reported out of committee in 1989, the Senate version still required EEOC supervision where no "bona fide" claim had been made. S. Rep. No. 79, 101st Cong., 1st Sess. 3 (1989). The House version, on the other hand, would have permitted *no* waivers other than in settlement of a "bona fide claim." H.R. Rep. No. 221, 101st Cong., 1st Sess. 3 (1989). No further action was taken.

When Congress reconvened in 1990, rather than pursuing the previous bill language, the Senate Committee on Labor and Human Resources decided to add waiver provisions to S. 1511, a pending bill to amend the ADEA with respect to employee benefits. S. Rep. No. 263, 101st Cong., 2d Sess. 31 (1990). As the Committee Report on that legislation explains, the new waiver language "represents a change from the approach taken in the Waiver Protection Act (S. 54) that was reported out of the Committee last year." *Id.* at 31.

Indeed, the new waiver language added to S. 1511, styled "Title II—Waiver of Rights or Claims," provided a significantly different set of standards for irrevocable waivers of ADEA claims than did its predecessor bills. Most importantly, the bill eliminated the requirement for EEOC supervision and assertion of a "bona fide claim." In their place was an entirely new mandate involving a considerably different set of requirements.[12]

In April 1990, the House Education and Labor Committee met to consider H.R. 3200, the House companion bill to S. 1511. There, the 1989 House waiver bill, H.R. 1432, was added to the Committee bill. H.R. Rep. No. 664, 101st Cong., 2d Sess. 5 (1990). Thus, the House bill lacked the newer modifications added by the Senate Labor Committee.[13]

In the fall of 1990, the Senate passed S. 1511, containing the waiver standards as modified. 136 Cong. Rec. S13,611 (daily ed. Sept. 24, 1990). Shortly thereafter, the House passed S. 1511 in the same form as it had passed the Senate. That legislation became the Older Workers Benefit Protection Act. Pub. L. No. 101-433, 104 Stat. 978 (1990).

To summarize, OWPBA's waiver provisions began as a proposal to mandate government supervision of private agreements, and evolved into a list of minimum requirements for making such agreements irrevocable. As discussed below, however, nothing in the statutory language suggests that OWPBA allows an

[12] For this reason, legislative history of prior versions is of little use in interpreting the final bill. Although the Senate Committee on Labor and Human Resources incorporated by reference the "need for the legislation" from a previous report, it did so only as to that section of the report, and only to the extent that it was consistent with the current version. S. Rep. No. 263, 101st Cong., 2d Sess. 15 (1990).

[13] Accordingly, none of the House proceedings other than final debate and passage are helpful legislative history for the bill.

individual who has signed a potentially revocable release to keep the consideration while challenging the release.

1. *OWBPA's Statutory Language Does Not Preclude Ratification*

Section 201 of the Older Workers Benefit Protection Act (OWPBA), Pub. L. No. 101-433 (Oct. 16, 1990), 29 U.S.C. § 626(f), provides that:

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . [A] waiver may not be considered knowing and voluntary unless at a minimum [it meets the enumerated requirements].

Id. The basic prerequisites are: (1) an understandable written agreement; (2) with a direct reference to the ADEA; (3) that operates only retroactively; (4) in exchange for consideration. In addition the individual must be given (5) written advice to consult an attorney; (6) twenty-one days to make the decision; and (7) a seven day revocation period. 29 U.S.C. § 626(f)(1). In addition, where the waiver is "requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," each individual must be afforded forty-five days to make a decision, and must be given substantial information about the program, eligibility requirements, and the individuals who may and may not be participating. *Id.*

Although the OWBPA contains a number of specific requirements, neither its language nor its history state that the employee may set aside the release and keep the consideration. "[N]either the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Wamsley*, 11 F.3d at 539-40. If anything, the language of OWBPA more likely suggests that

noncomplying waivers are merely voidable, at the option of the individual, not void *ab initio*. *Blistein v. St. John's College*, 74 F.3d 1439, 1466 (4th Cir. 1996); *Wamsley*, 11 F.3d at 539. As the Fourth Circuit explained:

> From Congress' reliance upon the terms "knowing" and "voluntary," which parallel the common law concepts of fraud, duress and mistake, it is apparent that Congress was defining only those circumstances in which a contract would be voidable, not when it would be void. *See* S. Rep. No. 263 at 31-32, *reprinted in* 1990 U.S. Code Cong. & Admin. News at 1509, 1537 (referring to "the absence of fraud, duress, coercion, or mistake of material fact" in discussion of the 'knowing and voluntary' issue). For, at common law, fraud, duress and mistake did not void a contract, but rather, only rendered that contract voidable. *Wamsley*, 11 F.3d at 538 (citing Restatement (Second) of Contracts § 7 cmt. b).

Blistein, 74 F.3d at 1466.[14]

The Seventh Circuit, in *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), incorrectly viewed OWBPA's "may not waive" language to mean that releases that did not meet the minimum OWBPA standards were void and incapable of being ratified under any circumstances. 11 F.3d at 683.[15]

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[14] The EEOC's proposed regulations interpreting the OWBPA likewise reflect this point. The proposal provides, "Other facts and circumstances bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver." 62 Fed. Reg. 10787, 10790 (1997).

[15] Inexplicably, the Seventh Circuit relied on *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992), and *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991), for this proposition. Both of those cases arose prior to

In fact, a clarification given on the Senate floor by the bill's sponsors shortly after passage suggests that Congress did intend to give individuals the latitude to forego the Act's specific requirements if they choose to do so. Section 201(f)(1)(F), one of the specific requirements for a "knowing and voluntary" waiver, requires that an individual be given either 21 or 45 days to consider the agreement, depending upon the type of program involved. 29 U.S.C. § 626(f)(1)(F). A colloquy between Senator Metzenbaum, the bill's chief Senate sponsor, and Senator Hatch indicates that the Senators intended to allow individuals to waive the Act's protections and take less than the minimum stated time to sign. Senator Hatch asked whether the minimum time periods could be shortened at the individual's option. Senator Metzenbaum responded:

> Of course, an employee may determine that he or she does not wish to wait the full 21 or 45 days, and may desire to enter into the agreement prior to that time. A shorter period of time is permissible as long as the employee's decision to accept such shorter period of time is knowing and voluntary.

136 Cong. Rec. S13,808 (daily ed. Sept. 25, 1990) (statement of Sen. Metzenbaum). This colloquy demonstrates that Congress intended for individuals to be able to waive the minimum requirements if they so desire.

Thus, nothing in either the language or the legislative history of OWBPA precludes application of the doctrine of ratification.[16]

passage of the OWBPA, however, and neither case addresses the "may not waive" language.

[16] Intriguingly, the Third Circuit majority in *Long* and the Government in its brief to the Court in this case attempt to construct a legislative basis for their position by mischaracterizing a letter

2. *Since Congress Did Not Indicate That OWBPA Was Intended to Supplant the Common Law, It Should Not Be Read as Doing So*

Since neither OWBPA nor its legislative history addresses the issue of ratification, it is presumed that Congress intended the common law doctrine to

submitted to Congress by a major corporation while OWBPA was under consideration. *Long*, 105 F.3d at 1540 n.19; *Brief of the United States and the Equal Employment Opportunity Commission* (hereinafter EEOC Brief) at 24. The EEOC brief contends that "it was understood that the OWBPA would permit an employee who signed an invalid waiver to pursue his or her ADEA claim while retaining the separation benefits paid under the waiver." The agency bases its conclusion on a letter from IBM to the Senate Labor Subcommittee, quoted in minority views to two Congressional Committee reports. H.R. Rep. No. 664, 101st Cong., 2d Sess. 87 (1990) (dissenting views); S. Rep. No. 263, 101st Cong., 2d Sess. 64 (1990) (minority view). The EEOC brief summarizes the IBM letter thus: "At least one corporation raised the concern that it would have to bear the high costs of litigating ADEA claims even where it had paid significant consideration for releases as part of a departure program." EEOC Brief at 24.

In reality, IBM was responding to S. 54, a very early waiver bill, that would have forbidden *any* waiver of ADEA claims unless it was either in settlement of a "bona fide claim" of age discrimination or supervised by the EEOC. 135 Cong. Rec. S168 (daily ed. Jan. 25, 1989). Expressing concern that the waiver bill would cause employers to eliminate or reduce programs offering additional benefits to departing workers, the Committee reports *accurately* quote IBM as saying,

> IBM considers the right to require an enforceable release of all employment-based claims in exchange for the significant consideration given as part of such programs an important one. There is no reason an employer should be expected to make these significant payouts and then have to bear the high costs of litigating ADEA claims with the recipients.

H.R. Rep. 664 at 87; S. Rep. 263 at 64 (quoting Letter of J.G. Parkel, IBM Corp., to Hon. Howard M. Metzenbaum, Chairman, Sen. Lab. Subcomm., Mar. 21, 1989, *reprinted in Waivers Under the Age Discrimination in Employment Act: Joint Hearing Before the Select Comm. on Aging and the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Lab.*, 101st Cong., 1st Sess. 142 (1989)). Nothing in the letter suggests that IBM had any intention of both making significant payouts in exchange for a release and still having to litigate with the recipients.

stand. It is a basic tenet of statutory construction that "[a]bsent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." Sutherland Stat. Const. § 50.01 at 90 (5th ed. 1992). As this Court has noted:

> longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." . . . In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

United States v. Texas, 507 U.S. 529, 534 (1993) (citations omitted). *Accord, Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."). The "may not waive" language, the only words that even arguably touch on this issue, falls far short of the standard established by this Court in *United States v. Texas* for statutory abrogation of a common law principle. Since the OWBPA does nothing of the sort, the common law rule applies.

This conclusion is supported further by the fact that the only published decisions addressing the tender back issue in the ADEA context when the OWBPA was passed *applied* the ratification doctrine. *O'Shea v. Commercial Credit Corp.*, 734 F. Supp. 218 (D. Md. 1990), *aff'd*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Widener v. ARCO Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989);

Constant v. Continental Tel. Co., 745 F. Supp. 1374 (C.D. Ill. 1990). Since Congress did not address the ratification/tender back doctrine directly, it can be presumed that Congress knew of this precedent and allowed it to stand. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Indeed, where Congress intended to adopt a standard different from that applied in case law on a particular issue, it noted the case and expressed its disapproval. *E.g.*, S. Rep. No. 263, 101st Cong. 2d Sess. 32 (1990).

The FELA amply demonstrates how Congress *does* address this issue when it chooses to do so. The FELA explicitly provides that any contract seeking to limit an employer's FELA liability is *void*, but allows a setoff for money previously paid by the employer. 45 U.S.C. § 55.[17] The ADEA contains no such provision. Had Congress wanted to include language in OWBPA declaring void and incapable of ratification a release that does not meet all of the statutory requirements, it clearly could have done so. It did not.

3. *Application of the Ratification/Tender Back Doctrine Is Consistent With the Purposes of the ADEA and OWBPA as Well as Public Policy*

As this Court has noted, "out of court dispute resolution . . . is consistent with the statutory scheme established by Congress [in the ADEA]." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29

[17] 45 U.S.C. § 55 states:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee for the person entitled there to on account of the injury or death for which said action was brought.

(1991). As the Fifth Circuit pointed out in *Wamsley*, an interpretation of the OWBPA precluding ratification of defective ADEA releases "would be inconsistent with one of the expressed purposes of the ADEA: to 'help employers and workers find ways of meeting problems arising from the impact of age on employment.'" 11 F.3d at 539 (quoting 29 U.S.C. § 621(b)). "The simplest and easiest way to further this purpose," the Fifth Circuit stated, "is to give effect to the private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation." *Id.* Accordingly, the Fifth Circuit continued,

> Were employers forced to assume the risk that noncompliance with all of [the] statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.

Id.

The Fifth Circuit is quite correct. Like Entergy, many employers who are faced with the necessity of workforce reductions offer special severance benefits to ease the impact of lost employment. The benefits provided by these programs often are quite substantial and far in excess of any to which the employees otherwise would be entitled. Some employers, depending upon financial circumstances and other considerations, also offer early retirement incentives and other voluntary termination programs in lieu of layoffs.

Because these employers voluntarily are offering benefits considerably more than they are legally obligated to pay, they frequently require that the employees who choose to receive these additional benefits execute a release of claims in return. The Equal Employment Opportunity Commission estimates that more than 13,700 employers a year offer programs

involving benefits in exchange for waivers. *Waivers of Rights and Claims Under the Age Discrimination in Employment Act*, 62 Fed. Reg. 10787, 10789 (to be codified at 29 C.F.R. pt. 1625) (proposed Mar. 10, 1997). Of course, employees cannot be forced to sign releases against their will, but those who do not sign do not receive the additional benefits. In this manner, the employer buys peace, and employees who choose to participate receive substantial additional benefits.

Absent a tender back requirement, disgruntled former employees are free to ignore their part of the bargain, while retaining the consideration paid to them in exchange. As the Fourth Circuit observed disapprovingly in *Blistein*, such a rule "would . . . allow [them] to have it 'both ways,' to retain the benefits that they received pursuant to their retirement agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended." 74 F.3d at 1466.

Such latitude creates a substantial disincentive for employers to offer such benefits. Even for those employers that continue to do so, the lack of certainty will substantially reduce the amount they are willing to pay for a partial release.

Moreover, the minimum requirements of the OWBPA are hardly the "cookbook" that Petitioner's *amicus* American Association of Retired Persons (AARP) perceives them to be. *Brief of the AARP* at 16. The various requirements are capable of sufficient different interpretations to generate substantial uncertainty even for an employer that meticulously has attempted to meet them. As one commentator has stated, "[t]he nature of some of the OWBPA conditions . . . may make achieving—and proving—compliance more difficult than it seems and could undermine the certainty and expense control a release

agreement is designed to afford." Glen D. Nager & Steven T. Catlett, *Employees Can't Have Their Cake and Eat It Too: Estopping Age Discrimination Complainants Who Have Signed Releases*, 19 Employee Rel. L.J. 295, 296-97 (1993). Indeed, the minimum OWBPA requirements are ambiguous enough that the EEOC convened a negotiated rulemaking committee to draft proposed rules interpreting them. *Waiver of Rights and Claims Under the Age Discrimination in Employment Act*, 62 Fed. Reg. 10787, 10788 (1997) (to be codified at 29 C.F.R. pt. 1625) (proposed Mar. 10, 1997).[18]

Thus, it is surprisingly easy for potential plaintiffs to attack a release as falling short of the OWBPA standards. For example, they may disagree with the scope of the "organizational unit," identified by the employer to comply with 29 U.S.C. § 626(f)(1)(H)(ii). *Griffin v. Kraft Gen. Foods*, 62 F.3d 368 (11th Cir. 1995). *Cf. Long v. Sears, Roebuck & Co.* They may differ on whether the employer provided the right type of information as to the "job title" or "job classification" of eligible and ineligible employees, as they did in *Raczak v. Ameritech*. Several courts of appeals already have reached the conclusion that OWBPA compliance is a complex factual issue. *Raczak*, 103 F.3d at 1262 ("[W]e hold that the terms 'job title,' 'job classification,' and 'organization unit' should be interpreted on a case-by-case basis, with an eye to the purposes of the Act, rather than a dogmatic exercise in definition."); *Kraft*, 62 F.3d at 373. Naturally, "it is in the interest of the worker trying to void the release to quibble with whatever definition was used by the company." *Raczak* at 1263.

Indeed, a prospective plaintiff can cast doubt on the validity of the release merely by alleging, as plain-

[18] Not surprisingly, the Committee was unable to reach consensus on the ratification/tender back issue, and thus no rule is proposed on that point. *Id.*

tiffs did in *Wamsley*, that they were told orally they had less time than the statutory minimum to consider and sign the release, even though the documents allowed the full statutory period. 11 F.3d at 537. Any of these challenges will plunge the employer into litigation over the validity of the release—precisely the result the employer had hoped to avoid by purchasing a release.

This scenario—all too real—would so limit the utility of waivers that they would become virtually useless to employers. As Seventh Circuit Chief Judge Posner observed in *Fleming*, "[n]ot even plaintiffs are helped in the long run by a rule allowing them to have their cake and eat it, for a defendant will not pay as much for a release that the plaintiff can challenge without having to repay the money as the price of maintaining the challenge." 27 F.3d at 261. Even more likely, as the Fifth Circuit recognized in *Wamsley*, it follows that employers who choose not to provide additional severance benefits without a release in return simply will cease offering such benefits.

Since reductions in force still may be a financial necessity or business option from time to time, however, layoffs will still occur—but without the additional benefits offered in the past. As a consequence, the many employees who face layoffs but have no grounds to challenge their terminations will be deprived of a substantial payment that might mean the difference between financial security and financial peril.

The contention that requiring a tender back of consideration gives employers a "windfall" is ludicrous. If the release is enforced, the employer gets the benefit of its bargain, no more, no less. If the release is determined to be invalid, but no tender is required, the employer is placed in the worst possible position—

it is out the consideration, but still must defend itself in litigation. If the release is determined to be invalid and tender *is* required, then the parties are simply restored to the *status quo ante*—the employer has its money back, but has no protection against the forthcoming litigation that the former employee is now free to bring.

Similarly, the contention that prospective plaintiffs should not be expected to return the benefits because they need the money, or already have spent it, loses sight of the fact that this is consideration for a promise, not money to which they otherwise are entitled.

Tender back of consideration paid for a release is a basic tenet of contract law that is not inconsistent with the true purposes of the ADEA. While the OWBPA provides for minimum requirements for an irrevocable release,[19] nothing in either statute suggests that either party can revoke the deal and keep the consideration. Elimination of the rule may result in employers offering less—if any—severance benefits and hurt those older workers who look forward to retirement with an extra "golden parachute" from the company.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council, the Chamber of Commerce of the United States, and the Edison Electric Institute respectfully submit that the decision of the court below should be affirmed.

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[19] The argument of Petitioner's *amicus* the National Employment Lawyers Association that "waivers should not be subject to the rule of tender back that applies to releases" does not withstand scrutiny. *Brief of National Employment Lawyers Association* at 5. If this were correct, then it would seem to follow that releases such as the operative document in the instant case would not be subject to the OWBPA requirements that apply to waivers.

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